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; DAVID E. LUJAN,

Real Parties in Interest.

Case No. 81975

PETITIONER'S APPENDIX, VOLUME 23
(Nos. 3529–3732)

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DISTRICT COURT

CLARK COUNTY, NEVADA

AARON M. MORGAN, individually,

Plaintiff,

vs.

DAVID E. LUJAN, individually; HARVEST MANAGEMENT SUB LLC; a Foreign-Limited-Liability Company; DOES 1 through 20; ROE BUSINESS ENTITIES 1 through 20, inclusive jointly and severally,

Defendants.

Case No. A-15-718679-C
Dept. No. XI

APPENDIX OF EXHIBITS TO DEFENDANT HARVEST MANAGEMENT SUB LLC'S MOTION FOR ENTRY OF JUDGMENT

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DATED this 21st day of December, 2018.

BAILEY❖KENNEDY

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

I certify that I am an employee of BAILEY❖KENNEDY and that on the 21st day of December, 2018, service of the foregoing **APPENDIX OF EXHIBITS TO DEFENDANT HARVEST MANAGEMENT SUB LLC'S MOTION FOR ENTRY OF JUDGMENT – VOLUME 4 OF 4** was made by mandatory electronic service through the Eighth Judicial District Court's electronic filing system to the following:

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EXHIBIT 11

EXHIBIT 11

RTRAN

DISTRICT COURT

CLARK COUNTY, NEVADA

AARON MORGAN, Plaintiff, vs. DAVID LUJAN Defendant.	CASE#: A-15-718679-C DEPT. VII

BEFORE THE HONORABLE **LINDA MARIE BELL**, DISTRICT COURT JUDGE

TUESDAY, APRIL 3, 2018

RECORDER'S TRANSCRIPT OF HEARING
CIVIL JURY TRIAL

APPEARANCES:

For the Plaintiff: DOUGLAS GARDNER, ESQ.
DOUGLAS RANDS, ESQ.

For the Defendant: BRYAN BOYACK, ESQ.
BENJAMIN CLOWARD, ESQ.

RECORDED BY: RENEE VINCENT, COURT RECORDER

Las Vegas, Nevada, Tuesday, April 3, 2018

THE MARSHAL: Please rise for the jury.

[Prospective Jurors enters at 10:23:27 a.m.]

THE COURT: Back on the record in case number A-718679, Morgan vs. Lujan. Let the record reflect that the presence of all our prospective jurors.

MR. CLOWARD: Yes, Your Honor. Oh, I'm sorry.

THE COURT: All right.

MR. RANDS: I agree with him.

THE COURT: Good morning.

MR. RANDS: It's my only time today.

THE COURT: Okay. So I'm going to ask the following people if they would go back to jury services and thank you for your time.

Ms. Pederson [phonetic], ma'am.

Mr. Sidaran Bacue [phonetic], sir.

Ms. Weferling [phonetic], ma'am.

And, Mr. Leong [phonetic]. So thank you all.

And we're going to call up some people to take their place.

THE CLERK: In seat number 7, badge number 38, Constantino Toutoulis. In seat number 8, Kenji Hall, badge number 39. In seat number 11, badge number 40, James Lane. And in seat number 14, badge number 41, Daniel Sibelrude.

THE MARSHAL: Right over there, sir.

THE COURT: All right. Is it Mr. Toutoulis? Is that correct?

PROSPECTIVE JUROR NUMBER 38: Excuse me?

THE COURT: How do you pronounce your last name?

PROSPECTIVE JUROR NUMBER 38: Toutoulis.

THE COURT: Toutoulis. All right, sir, if you will introduce yourself, please?

PROSPECTIVE JUROR NUMBER 38: Yes. My name is Constantino Toutoulis. I've lived in Clark County for 30 years. I have a Bachelor's degree in criminal justice from UNLV. I work at UNLV at the Parking Enforcement Department. I'm one of the supervisors over there. I am not married and I don't -- I do not have any children.

THE COURT: All right. Sir, have you ever served as a juror before?

PROSPECTIVE JUROR NUMBER 38: No.

THE COURT: Have you ever been a party to a lawsuit or a witness in a lawsuit before?

PROSPECTIVE JUROR NUMBER 38: No.

THE COURT: Have you or anyone close to you worked in the legal field?

PROSPECTIVE JUROR NUMBER 38: No.

THE COURT: Have you or anyone close to you had medical training or worked in the medical field?

PROSPECTIVE JUROR NUMBER 38: No.

THE COURT: Have you or anyone close to you suffered a serious injury?

PROSPECTIVE JUROR NUMBER 38: No.

THE COURT: Have you or anyone close to you been in a car

crash?

PROSPECTIVE JUROR NUMBER 38: No.

THE COURT: Can you wait to form an opinion until you've heard all of the evidence?

PROSPECTIVE JUROR NUMBER 38: Excuse me?

THE COURT: Can you wait to form an opinion until you've heard all of the evidence?

PROSPECTIVE JUROR NUMBER 38: Yes.

THE COURT: Can you follow the instructions on the law that I give you even if you don't personally agree with them?

PROSPECTIVE JUROR NUMBER 38: Yes.

THE COURT: Can you set aside any sympathy you may have for either side and base your verdict solely on the evidence and the instructions on the law presented during the trial?

PROSPECTIVE JUROR NUMBER 38: Yes.

THE COURT: Is there any reason why you couldn't be completely fair and impartial if you were selected to serve as a juror in this case?

PROSPECTIVE JUROR NUMBER 38: No.

THE COURT: And if were a party to the case, would you be comfortable having someone like yourself as a juror?

PROSPECTIVE JUROR NUMBER 38: Yes.

THE COURT: Mr. Cloward?

MR. CLOWARD: Yes, Your Honor. Thank you. Just updating my seating chart.

Mr. is it Toutoulis?

PROSPECTIVE JUROR NUMBER 38: Toutoulis, yes.

MR. CLOWARD: How are you today?

PROSPECTIVE JUROR NUMBER 38: Good. How are you?

MR. CLOWARD: Good. I'm going to stand over here so I can get a line of sight.

No, you're fine. You're fine. You're fine. I can move over.

So how have you been?

PROSPECTIVE JUROR NUMBER 38: So far so good.

MR. CLOWARD: Did we put you to sleep yesterday sitting in the back or what did you think of the conversation?

PROSPECTIVE JUROR NUMBER 38: It's my first experience here and it's very tedious.

MR. CLOWARD: A lot of questions and sometimes personal. What were some of the things that you kind of maybe -- you had feelings about when we were discussing things with the rest of the group?

PROSPECTIVE JUROR NUMBER 38: You know, I see everyone has unique perspectives and opinions about their beliefs and what they interpret things, but it's an interesting process.

MR. CLOWARD: Yeah. When we were talking yesterday with some of the folks, I believe Mr. -- and I wrote over his name. I can't remember. The person that was sitting next -- would have been sitting where Mr. Hall is sitting, but he's no longer here. He felt like, you know, that when I talked about the amount of money, that, you know, he felt like I was here trying to fool him.

How did you feel when I talked about those things?

PROSPECTIVE JUROR NUMBER 38: That you were trying to fool him?

MR. CLOWARD: Yeah.

PROSPECTIVE JUROR NUMBER 38: Oh, I disagree, but me, personally, I do not know the severity of the case. Of course a million dollars is a lot of money.

MR. CLOWARD: Sure.

PROSPECTIVE JUROR NUMBER 38: But I can't -- myself, I can't judge anything like that because I have no idea what the case is all about, so, yeah.

MR. CLOWARD: Yesterday it seemed like there were a couple of different reactions that came out that kind of were common reactions. Some folks felt like when I talked about that amount some folks wondered, well, I wonder what happened. Other folks kind of felt like, oh, that's, you know, that's no way.

How did you feel?

PROSPECTIVE JUROR NUMBER 38: Myself, I don't like to assume anything.

MR. CLOWARD: Okay.

PROSPECTIVE JUROR NUMBER 38: I mean, I've heard, you know, stories in the past from different people. I mean, yes, are there frivolous law suits happening around the world in the country? Of course, yeah, you know. But every case is different and unique and you know, I'm not going to generalize every single case and you know, maybe it's

warranted. Maybe it's not. I don't know yet. I -- you know, I have to wait and see, so.

MR. CLOWARD: Who, I guess, did you learn that from somebody, kind of the -- that approach? Is that something you were taught or just something?

PROSPECTIVE JUROR NUMBER 38: Well, through school, through family experience, books I read; just life in general, life experience and other people's experiences.

MR. CLOWARD: Got you.

PROSPECTIVE JUROR NUMBER 38: Not necessarily mine, but just one. You know what I'm saying.

MR. CLOWARD: We have a couple Charles Duhiig fans. Mr. Lane, it looks like has the same book *Power of Habit*. What are some books that maybe you have -- we would find on your bookshelf, say, for instance?

PROSPECTIVE JUROR NUMBER 38: Well, I've read a lot of -- I was interested in psychology in my --

MR. CLOWARD: Tell me about that.

PROSPECTIVE JUROR NUMBER 38: I taught myself a lot of psychology, self-taught. Self-improvement books, growth, being self-actualized, things like that. I have a Bachelor's degree from UNLV. And on my own, I also studied psychology for a year on my own. I read books about just the reality of life, you know, the -- just being a realist basically. And things that help you reach your full potential, I supposed, so.

MR. CLOWARD: Okay. Yesterday Ms. Weberly, kind of talked

about how, in life, her view is that, you know, it's life happens and bad things happen to people. It's kind of their cross to bear and so forth.

Do you think that or are you someone that believes that, you know what, bad things do happen, but there also should be accountability if somebody does something wrong?

PROSPECTIVE JUROR NUMBER 38: Well, bad things, you know, life is unpredictable. So you know, whatever happens to you, you know, and hopefully if it's good or bad, it's an experience and sometimes those experiences can change people -- their perspective on things. There's a saying, say there's, you know, in life ten percent of things happen to you and 90 percent of the things is how you react to them. So but it's -- every -- you know, you never stop learning until the day you die. So, but nobody's perfect. So -- but it's a learning experience day by day basically, so.

MR. CLOWARD: Okay. Do you believe that -- do you believe in personal responsibility?

PROSPECTIVE JUROR NUMBER 38: Yes. I do.

MR. CLOWARD: Would you believe that if somebody acts a certain way that harms another person there should be consequences or are you an individual that kind of looks at it like, you know what, life is what it is and?

PROSPECTIVE JUROR NUMBER 38: Well, everybody makes a choice, and consequences can be negative or positive based on what that choice was. And sometimes someone's actions can affect other people's lives, personally for permanently or temporarily. But there's always consequences to someone's actions. Always. Positive or negative. It's

always an effect. There's always some effect, so.

MR. CLOWARD: Okay. Getting a question here from Marge.

[Counsel confer]

MR. CLOWARD: You know, if you were selected as the juror and you found that the, you know, the Defendant did do something wrong, how would you feel holding someone else accountable?

PROSPECTIVE JUROR NUMBER 38: The Defendant did something wrong?

MR. CLOWARD: Sure. I mean, if we prove -- if Aaron proves his case --

PROSPECTIVE JUROR NUMBER 38: Uh-huh. Right.

MR. CLOWARD: -- how would you feel as a juror being put in that situation? Is that something that would bother you or not?

PROSPECTIVE JUROR NUMBER 38: It would not bother me.

MR. CLOWARD: Was there anything yesterday that was discussed that you had a strong feeling about or you were maybe surprised at the way that you felt when somebody else was talking that it actually, you know, got some emotions stirred up that maybe you hadn't really thought about before?

PROSPECTIVE JUROR NUMBER 38: Off the top of my head, I can't think of anything.

MR. CLOWARD: I appreciate everything that you've said to me. I always ask this question. Is there anything else that you think we might want to know about you in particular?

PROSPECTIVE JUROR NUMBER 38: No. Nothing. That's it.

MR. CLOWARD: Okay. Thank you very much.

PROSPECTIVE JUROR NUMBER 38: You're welcome.

MR. CLOWARD: Your Honor, Thank you.

THE COURT: All right. Mr. Rands?

MR. RANDS: Thank you, Your Honor. You're too tall, and the hair, you know?

As you know from the process, the Defendant always goes second in this process. It always is. They've got the burden. Judge will talk about that, but we always go second. The problem with being the Defendant is you also can't ask questions that have already been asked, so, you know, the Plaintiff's attorney, Mr. Cloward will be up here and he'll talk for 20-30 minutes at a time. And oftentimes that leaves me with really nothing to ask. And so, I don't -- you won't hold that against me, will you, if I try and get you out of here quicker. You won't hold that against me?

I want to talk a little bit about what you said about personal responsibility though from the other side. Do you believe that someone who is maybe injured in an accident also has some personal responsibility?

PROSPECTIVE JUROR NUMBER 38: Of course.

MR. RANDS: And they just can't lay around and say, you know, I've been hurt, now pay me millions of dollars, correct?

PROSPECTIVE JUROR NUMBER 38: Yes.

MR. RANDS: And as you said, a million dollars is a lot of money.

PROSPECTIVE JUROR NUMBER 38: It is.

MR. RANDS: And they've already said they're going to be

asking for a lot of money. If after the evidence comes in and you find -- even if you find my client responsible for the accident, you still -- that's only part one of what you're going to be doing. Part two is to assign damages. And if you find that the damages are significantly less than a million dollars, will you have a hard time looking at Mr. Morgan and saying, you know, you're not going to get a million dollars?

PROSPECTIVE JUROR NUMBER 38: No. I won't.

MR. RANDS: You would listen to the evidence?

PROSPECTIVE JUROR NUMBER 38: I would --

MR. RANDS: Evaluate the evidence to make a reasonable --

PROSPECTIVE JUROR NUMBER 38: Of course.

MR. RANDS: -- verdict? Not just because this is, you know, an accident that he was in.

PROSPECTIVE JUROR NUMBER 38: Right.

MR. RANDS: Now he needs to retire.

PROSPECTIVE JUROR NUMBER 38: Right.

MR. RANDS: I used to ask a question. And I've been doing this for 30 -- a lot more years than I want to think right now. And we used to ask a question, you know, what magazines do you read, but I found out people don't read magazines anymore. So it's not a really good question. You can't get much out of it. But are you someone who gets news on --

How do you get your news?

PROSPECTIVE JUROR NUMBER 38: Internet or on TV.

MR. RANDS: What kind of websites do you use for internet news?

PROSPECTIVE JUROR NUMBER 38: Sometimes CNN, Yahoo, kind of depending on the website. Some websites have better sources than others, but usually it's either CNN or Yahoo or whatever.

MR. RANDS: I'm a football fan, a college football fan and I -- there's a site called Cougarboard that I go for all my BYU news, but anything like that that you go to?

PROSPECTIVE JUROR NUMBER 38: Like sports websites?

MR. RANDS: Yeah.

PROSPECTIVE JUROR NUMBER 38: Oh, NFL or NBA. I'm a football fan and basketball fan.

MR. RANDS: You going to be a Raider's fan?

PROSPECTIVE JUROR NUMBER 38: I'm actually a Rams fan.

MR. RANDS: Rams fan. Well, they're not coming here, but my condolences.

PROSPECTIVE JUROR NUMBER 38: And a Raider's fan, so I can --

MR. RANDS: That's okay. I'm a Chief's fan, so we used to be in the same state there. I'm actually an Andy Reed fan, but that's -- I follow him around more than anything. But you've said that you got your degree in criminal justice.

PROSPECTIVE JUROR NUMBER 38: Yes.

MR. RANDS: And now you work for UNLV. Have you ever worked in the law enforcement?

PROSPECTIVE JUROR NUMBER 38: Not worked. I used to be an Explorer Metro. I wanted to be a police officer, and I just had a

change of heart. But I was with them for three years and went on ride-a-longs and I have some friends that are police officers who --

MR. RANDS: I understand the change or heart. I went to premed all the way through my senior year and then ended up in law school. So I can understand the change of heart.

But you've never worked in the law enforcement?

PROSPECTIVE JUROR NUMBER 38: No.

MR. RANDS: I guess technically you're quasi law enforcement.

PROSPECTIVE JUROR NUMBER 38: Parking enforcement, yeah. So, yeah.

MR. RANDS: Parking enforcement. Anything about your job as parking enforcement that you think would make you favor one side in this dispute over another?

PROSPECTIVE JUROR NUMBER 38: No. Not at all.

MR. RANDS: Are you someone, if you get in the jury room, that would -- you know, there -- it's a psychology kind of issue that you're going to put, you know, a number of you, eight, I think is the general number into a jury room and you will be given the case. And you'll be making the decision on the -- at the law as it's given to you by the Judge and on the facts and making a judgment on the case. So sometimes people get into a situation like that and they kind of go along with the crowd, or sometimes they'll go in and say, no, I think I saw it this way. And, you know, you have to deliberate. And, you know, sometimes you didn't see it right.

But are you someone who's going to just go along with the crowd? Are you going to be in there, at least make you opinion known?

PROSPECTIVE JUROR NUMBER 38: No. I will make my opinion known.

MR. RANDS: Have you ever been like a supervisor in anything?

PROSPECTIVE JUROR NUMBER 38: I'm currently a supervisor.

MR. RANDS: Okay. That's right. Should have listened better. Let me go over by -- I'm sorry. I'm going over my notes, too. But I have to check off the ones that have already been asked.

So one thing you'll find out in a case like this and it happens in all -- almost all civil cases is there's going to be more witnesses on one side than there are another. Reason for that is a lot of times the things that we put in -- the evidence are done through cross-examination of their witnesses. Or you know, again, we can't add -- we have to add -- we can't go over things that are already done.

Are you going to be the kind of person that says, well they had ten witnesses and they only had two, so the ten must win?

PROSPECTIVE JUROR NUMBER 38: No. Not necessarily.

MR. RANDS: You'll listen to the testimony; listen to cross-examination by the Defense?

PROSPECTIVE JUROR NUMBER 38: Yes.

MR. RANDS: Because sometimes people do that. They'll say, you know, they had ten witnesses, so ten's better than two, so they must win. And hopefully Mr. Cloward will ask his standard question about what's the worst thing that's happened to you in your life and how did you deal with

that. I'd kind of like to know since everybody else has given theirs, so?

PROSPECTIVE JUROR NUMBER 38: I would say a year and a half ago my father passed away. And I was very close to him. And he taught me a lot about life and people and, you know, it was -- I had a good relationship with him. But that would be like the worst day of my life so far.

MR. RANDS: Yeah. I can imagine. My dad's 85 and he's still hanging in there, but, you know, he's 85.

PROSPECTIVE JUROR NUMBER 38: Yeah.

MR. RANDS: So I understand life's not forever.

PROSPECTIVE JUROR NUMBER 38: No.

MR. RANDS: So how did you -- how have you dealt with it yourself? Is it?

PROSPECTIVE JUROR NUMBER 38: I just, you know, sometimes keep myself busy going out with friends, or reading things, just having family and friends support, things like that.

MR. RANDS: Yeah. Well, that's great. Good that you have the family support, too. That’s always important in a situation like that. You've ever heard the phrase, you know, get up by your bootstraps and move on?

PROSPECTIVE JUROR NUMBER 38: I think so.

MR. RANDS: And I'm not talking about you particularly, but have you heard that in general?

PROSPECTIVE JUROR NUMBER 38: In some variation of it, yeah.

MR. RANDS: And what do you think about that?

PROSPECTIVE JUROR NUMBER 38: It's -- you know, life

goes on, you know, and you know, don't think about the past. And live in the moment.

MR. RANDS: Live in the moment.

PROSPECTIVE JUROR NUMBER 38: You know, and you control your future.

MR. RANDS: You control your own destiny, right? Thank you. I appreciate your time. I hope I wasn't too overbearing.

THE COURT: All right. Mr. Hall, sir?

PROSPECTIVE JUROR NUMBER 39: Hi. Good morning. My name is Kenji Hall. I have lived in Clark County for the last seven years, prior to that in Louisiana. This is my third stint in Clark County. I have a Bachelor's degree in hospitality at University of Nevada Las Vegas. I am employed at San Manuel Casino in Highland, California as the chief operating officer. I have -- have been married for 25 years with two children. My wife works in retail currently. And my children are both adults: they are 23 and 21. One works for a medical supply company and for Cirque de Soleil and the other works for the South Point Casino.

THE COURT: All right. Sir, have you ever served as a juror before?

PROSPECTIVE JUROR NUMBER 39: I have not, ma'am.

THE COURT: Have you ever been a party to a lawsuit or a witness in a lawsuit before?

PROSPECTIVE JUROR NUMBER 39: In a courtroom setting, ma'am?

THE COURT: Yes, sir.

PROSPECTIVE JUROR NUMBER 39: Only a couple times in a courtroom setting and the [indiscernible] side, hundreds of times.

THE COURT: All right. So all related to your employment?

PROSPECTIVE JUROR NUMBER 39: Yes, ma'am.

THE COURT: Anything outside of your employment?

PROSPECTIVE JUROR NUMBER 39: No. Not outside of my employment.

THE COURT: Have you or anyone close to you worked in the legal field?

PROSPECTIVE JUROR NUMBER 39: My wife is a district court clerk here in Clark County and just several friends that have been judges and lawyers as well. I worked as a runner when I was in high school.

THE COURT: Have you or anyone close to you had medical training or worked in the medical field?

PROSPECTIVE JUROR NUMBER 39: No related family. Just friends in the community.

THE COURT: Have you or anyone close to you suffered a serious injury?

PROSPECTIVE JUROR NUMBER 39: Yes. My father had a one-car crash -- car accident back when I was in high school; was in the hospital for a long period of time. And then I had a couple of people that I've mentored in the past that have been in major car accidents with my, you know, people that I've worked with that have survived them, but month-long visits in a hospital.

THE COURT: And other than what you just mentioned, have

you or anyone close to you been in a car crash?

PROSPECTIVE JUROR NUMBER 39: I have as well as my daughter. She is my crasher. She's been in three accidents. I've been in two. I've driven a lot longer than her, but mine were two small fender benders, which were settled outside of court in insurance. My daughter's, two were settled out of court. One is currently pending.

THE COURT: Can you wait to form an opinion until you've heard all of the evidence?

PROSPECTIVE JUROR NUMBER 39: Yes.

THE COURT: Can you follow the instructions on the law that I give you even if you don't personally agree with them?

PROSPECTIVE JUROR NUMBER 39: I have been struggling to answer this question every time you've asked it. And it's -- in the form of this case, I don't believe it would be an issue. But I do know that as a juror and this jury that has a responsibility to make a decision. And sometimes if the moral values and the moral compass outweighs the current law, I feel like we have the right to overturn this.

THE COURT: All right. And I don't know that anything would come up that's too --

PROSPECTIVE JUROR NUMBER 39: I don't believe so from hearing what I have in this case. But I'd --

THE COURT: Controversial in a --

PROSPECTIVE JUROR NUMBER 39: -- realize I had to answer the question --

THE COURT: Yes, I understand in a negligence case. I mean

this used to come up in the context more of in criminal cases when possession of marijuana was still --

PROSPECTIVE JUROR NUMBER 39: Right.

THE COURT: -- illegal in Nevada. And there were certain people who felt very strongly that it should be legal. And that's mostly when this used to come up, and that's the example that I give if somebody doesn't quite understand what I'm asking. But thank you.

Can you set aside any sympathy you may have for either side and base your verdict solely on the evidence and the instructions on the law presented during the trial?

PROSPECTIVE JUROR NUMBER 39: I believe I can.

THE COURT: Is there any reason why you couldn't be completely fair and impartial if you were selected to serve as a juror in this case?

PROSPECTIVE JUROR NUMBER 39: I have a slightly weighted opinion against -- because of my occupation and the number of frivolous claims that come against me. I believe that I'm smart and logical enough though to make the decision on appropriate matters.

THE COURT: Okay. State you think you can decide this case based on this case?

PROSPECTIVE JUROR NUMBER 39: Yes.

THE COURT: And if were a party to the case, would you be comfortable having someone like yourself as a juror?

PROSPECTIVE JUROR NUMBER 39: Oh, [indiscernible].

THE COURT: Okay. Mr. Cloward?

MR. CLOWARD: If you were the defendant, but -- does that mean you would not feel comfortable if you were the Plaintiff?

PROSPECTIVE JUROR NUMBER 39: Yes.

MR. CLOWARD: And I appreciate that.

PROSPECTIVE JUROR NUMBER 39: You've asked for brutal honesty and I apologize --

MR. CLOWARD: No.

PROSPECTIVE JUROR NUMBER 39: -- that there's some things that will potentially come out of our questioning.

MR. CLOWARD: No. It's -- that's the great thing about this society we live in is we all have different views and that it's nothing to apologize about at all. Nothing wrong with my Aunt Nancy for her views on --

PROSPECTIVE JUROR NUMBER 39: I was going to say, I remember. I remember Aunt Nancy's story there.

MR. CLOWARD: nothing wrong with her views. Just the way that her views are. And really the thing that we try to find and I appreciate your brutal honesty is sometimes we think about things with our head, but in our heart we feel a certain way. And it sounds like, you know, you've talked about your moral values might outweigh a logical decision, that your heart might actually influence a decision. And I appreciate you sharing that more than anything, because that's -- you know, it's like the example I gave with cherry pie. I could try to be fair, but I promise you I wouldn't be fair. I know that about myself. I hate it. It's gross. I feel strongly about it. It's weird. It's almost like having an aversion to it. And so I know that about myself, you

know? Any other pie, man, give it to me, you know, and I'll eat the whole thing. So thank you for sharing. Please don't feel like you have to apologize.

What are some other reasons that -- and my tummy is growling big time, so if anyone can hear that, sorry. Haven't eaten yet. Tell me what are some other things, I guess, that you know about yourself. You know about the way, in your heart of hearts, being brutally honest that you feel like you maybe wouldn't be fair to the Plaintiff?

PROSPECTIVE JUROR NUMBER 39: In my occupation we get sued daily. I, you know, I had an incident happen last night at our property, and I know that it will come around and somebody will be suing our property for damages of some type. And I realize that, you know, unfortunately it puts a bad image on attorneys that are public injury on that side.

MR. CLOWARD: Sure.

PROSPECTIVE JUROR NUMBER 39: Especially when you're advertising casino accidents.

MR. CLOWARD: Sure.

PROSPECTIVE JUROR NUMBER 39: And with the exact term "accident" in those components there and the amount of money that we spend for these frivolous claims in many cases where, you know, I see the facts. I know what's going on with it, and it's easier for us to settle out of court than it is to come to court because of the costs. So we'll settle for $20,000 for a case and somebody who really has no business getting the money for it. And no offense to Aaron here, but, you know, I don't know the

amounts, but I certainly would promise you that I will come up with what I believe is a fair amount under the situation. And it might not be the same amount that you would be asking for.

MR. CLOWARD: Sure. Do you believe that your experience that even if the evidence show that it should be higher, you would probably reduce that just based on your experience?

PROSPECTIVE JUROR NUMBER 39: You would have really tough time proving the number that you're trying to get to.

MR. CLOWARD: Okay. I appreciate that. That's a fair response. So I guess it would be fair to say that on the issues of damages, Aaron would be starting off at a different spot than the Defendants and it would a tougher job for him to prove his case with you?

PROSPECTIVE JUROR NUMBER 39: Yes.

MR. CLOWARD: Okay. I appreciate it. Another thing I wanted to ask about was you -- you are going to throw the first pitch.

PROSPECTIVE JUROR NUMBER 39: I am.

MR. CLOWARD: That's a pretty big deal. Right?

PROSPECTIVE JUROR NUMBER 39: Well, again, yes. It's pretty -- it's -- we donate a lot of money to a lot of organizations one of them being the [indiscernible].

MR. CLOWARD: You don't get to do that every day?

PROSPECTIVE JUROR NUMBER 39: No.

MR. CLOWARD: Is that the first time you've ever done that?

PROSPECTIVE JUROR NUMBER 39: For a professional team, yes.

MR. CLOWARD: do you think that that, you know, if you were selected as the -- as a juror that that would weigh on your mind and would prevent you from listening to the evidence and you'd kind of be upset?

PROSPECTIVE JUROR NUMBER 39: No. I think like Ms. Keyho here was talking about with my job, you know, I have 1800 employees that report to me along the way that report through my chain.

MR. CLOWARD: That's a lot.

PROSPECTIVE JUROR NUMBER 39: And it's not about that component of what I'm doing. That's just something that I was asked by the Los Angeles Angels' Organization to do, but I have so many other things as well that would probably add, you know, like Ms. Keyho was mentioning there where we would rush through a little bit, because I'm thinking right now of the things. I didn't even eat lunch yesterday because it was an hour's work that I could get done. And when we complete at 6:00, I had two hours of work, continue to speak to people that were, you know, still in my jurisdiction at work.

MR. CLOWARD: Got you. Okay. I appreciate that clarification. And I did forget to ask the other question about difficulties in life and I'm sorry that I didn't remember that. It's on one of my cards; not on my outline and that's how I forgot about it but would like to ask you, you know, is -- are there things in your life that you've had to -- challenges that you've had to face? And more particularly I'm interested to know if there are challenges that you've had that looking back on it you kind of thing, you know what, I didn't really handle that the way that I could have or should have?

PROSPECTIVE JUROR NUMBER 39: You know, I've had a lot

of difficulties, but nothing to some of the extreme measures that some of our friends here on the other jury have had. You know my father having an accident when I was in high school, was out of commission. He was in, you know, he was an alcoholic. He did a lot of bad things in his life, and couldn't care for the family.

And I was working full time, going to school full time. I was playing on the athletic team at UNLV full time, and I did all of this because I needed to support Mom as well. And what would I have done differently? There, again, I just know that I have to buckle down and survive.

I try and tell my team, you know, it's about meeting adversity and beating it. I get -- I get with this job, I get to speak to amazing people who do those things, who might have not [indiscernible] who couldn't walk and came back and has done the crazy stuff he's done. But those are like Michael Crosslin [phonetic] is another one of my dear friends that was from Australia and beat cancer three times. And he's an amazing person.

And you see these things, and that's what I want myself to be. So sometimes when I -- if I look back and say what could I have done better, I think I could have been more inspirational to other people about being a better person and doing more than you think you're capable of.

MR. CLOWARD: Is that something you that you've learned over time, kind of having the perspective of the experience and wisdom that comes from just age itself?

PROSPECTIVE JUROR NUMBER 39: I think part of that is that and part of that is the association with great people. You know, when you meet people like those type of inspirational people, it does something to you

and it makes you want to be a better person. And I think that's always what I would expect. I hope that, you know, I would love for everyone here to listen to Michael Crosslin's story and think it's just inspirational of what he's done along the way. I think that everyone deserves a better life and you are what you make of it.

MR. CLOWARD: Sure. So for you it sounds like a big part of that introspective review, I guess, of life has been your ability to associate with like they say, Joel Osteen says, soar with the eagles.

PROSPECTIVE JUROR NUMBER 39: Absolutely.

MR. CLOWARD: Soar with the eagles rather than the turkeys, right?

PROSPECTIVE JUROR NUMBER 39: Right.

MR. CLOWARD: Even though turkeys are great fliers, you know, but does that kind of sum it up for you?

PROSPECTIVE JUROR NUMBER 39: Well, I think that, you know, again, it's about not necessarily just associating with that but it's about, you know, being one of those people. Not as well, not just associating with them, converting your own life. And that's a component.

You know there are a lot of bad things that happen. Like my friend sitting in front of me here with her daughter who's making something great out of a bad situation. I hope her daughter becomes a genetics doctor and solves the world's problems. I have confidence that she's going to do amazing things because of the bad situations that have happened. That's what I think that everyone should be doing in their life. I think that's just a part of what we do as human beings. And I don’t think we do enough of it.

MR. CLOWARD: Sure. Okay. Thank you for sharing. I really appreciate it. Thank you for giving me some insight. Thanks.

Thank you, Judge.

THE COURT: Mr. Rands?

MR. RANDS: Thank you.

Talked about a lot of inspirational people that have overcome adversity. What's the common denominator with those people?

PROSPECTIVE JUROR NUMBER 39: They never give up. They fight until the end and they won't stop unless and until they succeed.

MR. RANDS: They get knocked down; they get right back up?

PROSPECTIVE JUROR NUMBER 39: Absolutely.

MR. RANDS: Even if they're in pain and work through the pain?

PROSPECTIVE JUROR NUMBER 39: Yeah. Absolutely. I mean, like I said, some of these stories that I've heard would make you cry and the things that have happened. And you don't even -- like the one gentleman I mentioned, this Australian guy, Michael Crosslin, who I've met several times through friends. I've sent him emails back and forth now. You know, a year ago he had been rediagnosed, had to go back in and have another surgery. And it was his 30 or 40th surgery in his life there that he's had. And he came out of it and his wife is now pregnant. And it's, you know, it's one of those miracles. You're like this is an amazing thing. And I love those kind of people that do those --

MR. RANDS: So it's painful, the cancer, the treatment, the surgery --

PROSPECTIVE JUROR NUMBER 39: Absolutely.

MR. RANDS: -- it's all --

PROSPECTIVE JUROR NUMBER 39: Absolutely. I've seen the pictures and heard stories about it.

MR. RANDS: I've never been close to it fortunately. I had an assistant that went through some cancer therapy and the chemotherapy and it's not a pleasant thing even though, knock on wood or whatever I can knock on, she's doing good now and seems to be in remission.

So you talked a little bit about your -- well, I just wanted to commiserate with your daughter thing, too, because I have three daughters. My oldest was my accident prone one. In fact, I got in an accident with her where I broke my neck that's always good for -- because I could say remember that time you tried to kill me and -- but it's -- I guess one of the things that is difficult in being a defense attorney and defending cases is, you know, you hear the Plaintiff side first. And then you know, the Defense comes second.

So, you know, a lot of times when you hear something you're going oh, that's terrible. I can't believe that happened. I can't believe it. And if you make up your mind at that point, then it's really over for me, because you don't hear the full case. You didn't get the full argument. You don't get everything.

Are you someone that gets emotionally involved in something or can you kind of be a little more analytical?

PROSPECTIVE JUROR NUMBER 39: Yeah. In my job I have to be that way. You have to hear both sides of the story to know that there's a truth somewhere in the middle.

MR. RANDS: Correct.

PROSPECTIVE JUROR NUMBER 39: You know, and that's kind of, you know, with my daughter and her accident. I just come to brief terms. You know, she had this accident. She rear-ended somebody and did no damage to the car in front of that one. She was the third car in someone else's -- had a third car in too, or the last car in and no damage to the front car. However, there is, you know, I think it was a $400 dent that was in the car supposedly. So I can't say none, because I can't prove it; but thousands of dollars in medical bills for something that was a tap.

And then the middle car has now thousands of dollars in medical bills and pain and suffering and other things when there was, you know, again, less than -- you know, the air bag didn't go off. Nobody was -- you know, everybody was fine afterwards there and, you know, right now, the -- my insurance is fighting it. I'm sure two years from now we'll be in a situation potentially similar to this over something like that. And those things are just -- it's tough.

But -- so I know that I do believe that the people that she hit are deserving of something. I certainly don't believe the numbers that they're talking about is what they're deserving. And that's where I say the truth lies somewhere in between the two.

MR. RANDS: and if you were to listen to this case and hear the numbers that they're asking, they told you they're going to ask for millions of dollars. If you feel like the evidence shows that it's somewhere less than that, maybe even significantly less than that, would you have a problem saying I'm sorry, but, you know, my opinion and the jury's opinion is that it's

not a million dollar case. It's a --

PROSPECTIVE JUROR NUMBER 39: I think that's --

MR. RANDS: -- something less?

PROSPECTIVE JUROR NUMBER 39: -- that's what I do with my job every day. You know, historically, we take cases and decide what the true working value is and we, you know, attempt to settle for that value. And, obviously, if there's usually a middle place and a determination of what the cost of the case would be with lawyers, and so we find the middle ground and suck it up.

MR. RANDS: And that's kind of what you do. Sometimes the middle ground's not even really the middle. It's maybe --

PROSPECTIVE JUROR NUMBER 39: No. It never is.

MR. RANDS: -- closer one way or the other.

PROSPECTIVE JUROR NUMBER 39: Yes.

MR. RANDS: Also, it's not something I'm asking you to say okay, they're asking for $2 million, we're asking for zero. Let's give them a million dollars in the middle. That's not really what a jury should do either.

PROSPECTIVE JUROR NUMBER 39: No. It's -- like I said, it's somewhere in the middle. If there's -- you know, again, if your client is at fault, then Mr. Cloward's client deserves something out of. It's what that number truly needs to be is the question.

MR. RANDS: Yeah. Do you think it's important to use your common sense?

PROSPECTIVE JUROR NUMBER 39: Absolutely.

MR. RANDS: And if you were called -- picked to be a juror,

would you use your common sense?

PROSPECTIVE JUROR NUMBER 39: Absolutely, yes.

MR. RANDS: And you talked a little bit about, you know, the little scratch or $400 damage leading to hundreds of thousands of dollars or thousands of dollars.

Mr. Cloward talked yesterday with some of the jurors about frivolous defenses and we're talking about frivolous cases. And he was talking about frivolous defenses.

Do you believe that just because someone comes into court and says I want a jury to decide my case that's necessarily an indication that they shouldn't be in court?

PROSPECTIVE JUROR NUMBER 39: No. It's not an indication of that. I mean, again, without knowing the facts I can't tell you --

MR. RANDS: Sure.

PROSPECTIVE JUROR NUMBER 39: -- if this case is a frivolous case or not. I've just seen so many that are that come to litigation, some 90-plus percent of the ones that I see are in my head somewhat frivolous there or they're -- the word I would use is that it's just somewhat of an agreed principal that they're asking for more than what's deserved.

MR. RANDS: Somebody looking to win the lottery?

PROSPECTIVE JUROR NUMBER 39: Yes.

MR. RANDS: And you've indicated that you come in with a little bit of a preconceived prejudice or against people bringing lawsuits; is that correct?

PROSPECTIVE JUROR NUMBER 39: I wouldn't say against

the -- well, to some degree, yes. I would say that. I think I probably think more on, again, you told me not to apologize, but I blame it more on personal injury attorneys on that side and, you know, again, I know that they need to -- it's part of their job. They, you know, they get a portion of the cut as well. So they are going to ask for more because the more they get, the bigger their portion of the cut is.

MR. RANDS: is it something you could put aside though if you were picked to be a juror on this case and listen to all the evidence and make the decision based on the evidence presented?

PROSPECTIVE JUROR NUMBER 39: I think I could make a fair decision based off the evidence presented. I don't think, again, it's -- I think the evidence will speak the most, but I certainly, you know, know that in my history typically asking prices [indiscernible].

MR. RANDS: Thank you so much. Appreciate your time.

THE COURT: All right. Mr. Lane, sir?

PROSPECTIVE JUROR NUMBER 40: Hi. My name's James Lane. I actually go by Andy. It's my middle name, if anybody -- that's me. I've been in Clark County for just under three years. Before that, lived a couple years in Phoenix, and then originally from Chicago. Have a Bachelor's degree in finance. Currently employed as director of sales and marketing for Regent Street Advisors. It's an alternative investment fund based in Salt Lake City. I am married for 21 years. I've got two children 20 and 18 -- excuse me, 20 and 16. My wife works in gaming loyalty. My son goes to college here at the Art Institute. My daughter is a junior in high school.

THE COURT: All right. Sir, have you ever served as a juror before?

PROSPECTIVE JUROR NUMBER 40: No.

THE COURT: Have you ever been a party to a lawsuit or a witness in a lawsuit before?

PROSPECTIVE JUROR NUMBER 40: No.

THE COURT: Have you or anyone close to you worked in the legal field?

PROSPECTIVE JUROR NUMBER 40: My mother-in-law is in charge of all of the admin for a large insurance defense group in Chicago.

THE COURT: Have you or anyone close to you had medical training or worked in the medical field?

PROSPECTIVE JUROR NUMBER 40: No.

THE COURT: Have you or anyone close to you suffered a serious injury?

PROSPECTIVE JUROR NUMBER 40: No.

THE COURT: Have you or anyone close to you been in a car crash?

PROSPECTIVE JUROR NUMBER 40: Yes. Minor.

THE COURT: Can you wait to form an opinion until you've heard all of the evidence?

PROSPECTIVE JUROR NUMBER 40: Yes.

THE COURT: Can you follow the instructions on the law that I give you even if you don't personally agree with them?

PROSPECTIVE JUROR NUMBER 40: Yes.

THE COURT: Can you set aside any sympathy you may have for either side and base your verdict solely on the evidence and the instructions on the law presented during the trial?

PROSPECTIVE JUROR NUMBER 40: Yes.

THE COURT: Is there any reason why you couldn't be completely fair and impartial if you were selected to serve as a juror in this case?

PROSPECTIVE JUROR NUMBER 40: No.

THE COURT: And if were a party to the case, would you be comfortable having someone like yourself as a juror?

PROSPECTIVE JUROR NUMBER 40: Yes.

THE COURT: Mr. Cloward?

MR. CLOWARD: Your Honor, can I approach you really quickly?

THE COURT: Sure.

MR. CLOWARD: One little matter real fast.

[Bench Conference begins at 11:05:57 a.m.]

MR. CLOWARD: You indicated you wanted us to tell you if we're going to -- I'm going to assert a cause challenge on the last juror.

THE COURT: Yeah. I figured.

MR. CLOWARD: So I'm just letting you know.

THE COURT: Thank you.

MR. CLOWARD: Do you need me to?

THE COURT: Nothing else. Nope. Thank you.

MR. CLOWARD: Thank you. Is that what you -- is that how

you want it done, just basically --

THE COURT: Yeah. Just let me know so that I can --

MR. RANDS: May I -- I'm shocked that he's trying to cause challenge.

THE COURT: Me, too.

MR. RANDS: It just shocks the crap out of me.

[Bench Conference ends at 11:06:26 a.m.]

MR. CLOWARD: Good afternoon. Or what is it?

UNIDENTIFIED SPEAKER: It's still morning.

UNIDENTIFIED SPEAKER: It's morning.

MR. CLOWARD: It's night. It's day. There are no windows. I can't see the sun. That's my excuse.

How you doing today --

THE COURT: There actually is a window in here, Mr. Cloward.

MR. CLOWARD: Is there? That's a window. Okay. I guess you can --

THE COURT: It's one of the few. Most of the courtrooms are kind of like casinos. Most of them don't have one.

MR. CLOWARD: I need to get my --

Mr. Lane, how're you doing?

PROSPECTIVE JUROR NUMBER 40: I'm doing well. Thank you.

MR. CLOWARD: Good. So you're a Charles Duhiig fan as well?

PROSPECTIVE JUROR NUMBER 40: Yeah. Just started the

book, but so far so good.

MR. CLOWARD: Have you read any of the other books that he's written?

PROSPECTIVE JUROR NUMBER 40: I have not. No.

MR. CLOWARD: Okay. What do you like about that book?

PROSPECTIVE JUROR NUMBER 40: I do a lot of self-help, that kind of stuff. I just enjoy all kinds of inspirational reading. The thought of creating some good habits is always, I think, interesting.

MR. CLOWARD: Yeah. What are some other books that maybe you've read that you enjoy?

PROSPECTIVE JUROR NUMBER 40: Geez. Anything by Wayne Dyer. Recently read a lot of sale books by John [indiscernible]. I'm an avid reader though; anything about finance or markets I love to read about, too. So it goes well with my field.

MR. CLOWARD: And tell me a little bit about what you do? It's based in Salt Lake, the company?

PROSPECTIVE JUROR NUMBER 40: The fund's based in Salt Lake. I'm obviously here in Las Vegas and then I just try to raise capital for the fund. So it's a hedge fund is the easiest way to describe it. So work with accredited investors to try to just, you know, bring in money for the fund and raise money.

MR. CLOWARD: And do you enjoy doing that?

PROSPECTIVE JUROR NUMBER 40: Yeah. I love it.

MR. CLOWARD: How long have you done that?

PROSPECTIVE JUROR NUMBER 40: I've only been with this

group since January. I've worked in other facets of financial for a number of years and then was a commodity trader for 15 years in Chicago. So I've been in the financial markets for a long time.

MR. CLOWARD: Cool. Maybe you and Ms. Keyho can get together and exchange numbers and, you know, talk a little bit. You indicated that your wife was a gaming loyalty. I've never heard of that.

PROSPECTIVE JUROR NUMBER 40: Yes. So if you have a M life card or similar, they do the database. Well, actually they sit on top of the data, but they actually do the marketing. So they try to figure out how to get you back in and they understand how much each person is worth per person to come into the casino.

MR. CLOWARD: Wow.

PROSPECTIVE JUROR NUMBER 40: So they try to work with the properties to provide incentives for you to come in.

MR. CLOWARD: Figure out who the wells are?

PROSPECTIVE JUROR NUMBER 40: Yeah. Well, just everybody. Everybody -- it's crazy to think about the statistics they have on -- there's a value for every person that comes in, so they just try to get everybody in.

MR. CLOWARD: And the M life -- is that the M resort?

PROSPECTIVE JUROR NUMBER 40: That one's -- that's MGM's loyalty.

MR. CLOWARD: Okay.

PROSPECTIVE JUROR NUMBER 40: But every -- I mean, and there's, you know, everybody's familiar with Nom being in loyalty, too,

and, you know, Red Robin or places like that.

MR. CLOWARD: Yeah.

PROSPECTIVE JUROR NUMBER 40: Smith's -- if you have a Smith's card.

MR. CLOWARD: Southwest rewards/

PROSPECTIVE JUROR NUMBER 40: Same idea. Just trying to track and reward people for coming in.

MR. CLOWARD: Got you. Does she actually work for MGM or is it that she?

PROSPECTIVE JUROR NUMBER 40: No. It's a separate company called House Advantage.

MR. CLOWARD: Okay.

PROSPECTIVE JUROR NUMBER 40: Yeah. Their own little group.

MR. CLOWARD: Okay. And then I wanted to follow up on your mother-in-law?

PROSPECTIVE JUROR NUMBER 40: Yes.

MR. CLOWARD: She works for an insurance defense group in Chicago.

PROSPECTIVE JUROR NUMBER 40: Yes.

MR. CLOWARD: Can you tell me a little bit about that?

PROSPECTIVE JUROR NUMBER 40: So she's in charge of all of the admin in the western region, so Chicago west. She oversees all the admin staff. She's been a legal secretary for 40 years at least.

MR. CLOWARD: So is it an actual -- is it like a law firm that

focuses on that type of things?

PROSPECTIVE JUROR NUMBER 40: Yeah. They do insurance defense, so they -- their clients are insurance companies that are being sued for different things that they become, you know, a part of helping with that defense for the insurance companies.

MR. CLOWARD: There are a lot of different types of insurance claims, subrogation, different things like that. Do you know what area of -- it is?

PROSPECTIVE JUROR NUMBER 40: No. Not specifically.

MR. CLOWARD: Does she talk to you about that at all?

PROSPECTIVE JUROR NUMBER 40: No. Not specifically.

MR. CLOWARD: Okay. Is she more administrative or is she actually working on some of the files and different things? Do you -- I guess do you hear from her about the type of work that she does?

PROSPECTIVE JUROR NUMBER 40: She does work -- she works for four of the partners. I'm trying to -- I don't know specifically what she does. She does definitely work on some files for them, but then she manages all of the, like I said, the admin staff for the, you know, for the rest of the company. But they have -- they just, I think, just opened an office in Las Vegas. They have an office in Phoenix. They're also in, I believe, Houston. They're becoming pretty big actually.

MR. CLOWARD: What is the name of them?

PROSPECTIVE JUROR NUMBER 40: I'm trying to think of the name of the group. Litchfield Cavo is the name of the group.

MR. CLOWARD: Okay. I think I've heard of them maybe.

PROSPECTIVE JUROR NUMBER 40: Yeah. She works for Dan Litchfield, who's the founder and partner.

MR. CLOWARD: Main guy.

PROSPECTIVE JUROR NUMBER 40: Yeah.

MR. CLOWARD: Okay. Anything about the experiences that you've had that, I guess, what are your feelings on the issues that we've talked about specifically lawsuits, the lawyers?

PROSPECTIVE JUROR NUMBER 40: I think like kind of most people have said. I think we've all been kind of exposed to things that were -- that seemed to be frivolous, but one of the things that I've thought about since yesterday and since, you know, being here kind of watching everything that was happening yesterday, is that you also think about, okay. You're going about your daily life and something interrupts your daily life that you, you know, wasn't, you know, something that you obviously intended or wanted. And then now it's, you know, okay, well, everybody's talking about, okay.

Well, we have to be strong and overcome things, but you don't know how you're going to handle that when that happens to you or if that happens to you. So I don't know how you compartmentalize that and say, well, I would, you know, specifically act this way because, you know, being here on jury duty is like a small, tiny little example of that, right? I mean, we're living our daily lives and then I get a summons that says well, I have to interrupt two days of my life to come here and be a part of a jury. What if that were six months or a year or 20 years of my life?

MR. CLOWARD: Sure.

PROSPECTIVE JUROR NUMBER 40: You know, I don't know how I would react to that.

MR. CLOWARD: Yeah. I'm sure that, you know, we think about the Constitution. We think about, you know, the fundamental freedoms and rights that we have. You know, you could think about jury duty and think, you know, if I ever get jury duty I'm going to go down there and do my civic part. And then all of a sudden you get the summons and it's kind of like a different feeling when it happens.

PROSPECTIVE JUROR NUMBER 40: Yeah. It's been a really eye-opening and enlightening experience. I just kind of relating that to, you know, if I were in an accident, it wouldn't be just two days of my life being interrupted. It would be some unknown period of time. And out of nowhere, your life is all of a sudden disrupted and now you're dealing with something that you never expected that you had to deal with. It wasn't part of your daily routine; wasn't something that you asked for. So -- and there's definitely a side to that that's, I don't know. I haven't really heard anybody else say that they have to, you know, certainly consider that fact.

MR. CLOWARD: Yeah. Having something thrust upon you is you never really know how -- how you'll act, so is that fair?

PROSPECTIVE JUROR NUMBER 40: Yes.

MR. CLOWARD: Okay. I appreciate that. As you -- I'm not good at guessing ages, but we look about the same age.

PROSPECTIVE JUROR NUMBER 40: 45.

MR. CLOWARD: Pretty close.

PROSPECTIVE JUROR NUMBER 40: Younger than --

MR. CLOWARD: I'm actually only 39. People think I'm older because I lost all my hair. Started early on. But -- are there moments, you know, when you look back on life and you kind of think to yourself, you know, when I dealt with that, didn't really handle that the right way or, you know, I wish I'd have done this differently? Or have you always been the type that, you know, you rose to the occasion?

PROSPECTIVE JUROR NUMBER 40: Well, that's such an interesting question. I think that I'd like to say that I have been. I think my commodity trading experience and, you know, the people that have been kind of around markets or if you've even seen the markets for the last three or four days, I mean, if you're a part of that on a daily basis and you're riding that roller coaster is -- and this is kind of leading into one of the, you know, times in my life where I've had to go through something that's hard. And that was almost every day.

When you do well you're on top of the world and it's the best thing ever. When you can't figure out how to make money and feed your family, it's the worst thing ever. And so you have this roller coaster. I had this roller coaster for 15 years where I went through that.

And it wasn't all bad. It was a phenomenal experience, but anytime that you're feeling upset, depressed, you're going through something like that, of course, like the things around you are affected by it and I look back on things that were affected. You know, my marriage was affected by that. My relationship with my kids was affected by that.

And so, yeah, I think the answer to the questions is, yes, could I have handled those things better? Absolutely. And with more experience

and going through more of those things, you know, in other stages of my life, I absolutely have -- go through some trials a couple different times and realized that it would be better to go a different way and I [indiscernible].

MR. CLOWARD: Yeah. Fair to say that you, based on just your life experience, you'd handle those things better now than maybe you did at the time?

PROSPECTIVE JUROR NUMBER 40: Yeah. Absolutely. I appreciate that. What do you think about this whole concept of, you know, the ability of someone to come into court and sue another person and ask for money damages?

PROSPECTIVE JUROR NUMBER 40: Well, again, like I think like a lot of people have said, I think we all want to understand and really base our decision on what we're seeing and what the evidence is provided -- the proof that's provided. But I also think that for someone to come in and ask for a lot of money, it's not something that's upsetting to me. Again, you go back to like your life is completely changed by something that you didn't invite into your life. It wasn't something that was particularly anything that you wanted and it may not have been any fault of your own.

Now you have to deal with something that's a huge life-changing event. And it -- there is an emotional attachment to it. I don't know how to base an amount to that, but there has to be an emotional attachment to -- you don't go through something like that in a vacuum where you're just a robot and you wake up the next morning and now I've got to deal with pain and rehab and the change in my life, just, without any emotional attachment to it. So I don’t think it's unwarranted if there is cause

and there is reason. If there's supporting evidence, I don't think that that's unwarranted.

MR. CLOWARD: It's not troubling to you, I guess? You're willing to listen to the facts and the evidence and --

PROSPECTIVE JUROR NUMBER 40: Yes.

MR. CLOWARD: -- but certainly, just the fact that we're here doesn't mean that you're not --

PROSPECTIVE JUROR NUMBER 40: No. Of course not.

MR. CLOWARD: -- going to listen to it?

PROSPECTIVE JUROR NUMBER 40: Because we're here doesn't mean that one side's right and the other is, you know. We need to understand what's -- what the facts are, but.

MR. CLOWARD: Yeah. Let me ask about, I guess, your kind of decision-making. And, you know, when we talked earlier in the day yesterday about the decisions. You know maybe if you're in the -- if you're outvoted, but you feel strongly about something are you the type of a person that will just kind of shut down, or are you the type of person that's willing to have your voice be heard and try and let other folks know; like, look, let me tell you the way that I see things. Are you the type that's going to just see, you know, maybe there's five or six people that don't see it the way that I do, so I'm just going to kind of recede and let things happen? Are you going to be willing to give your voice?

PROSPECTIVE JUROR NUMBER 40: No. I'm definitely the type of person that will give voice to, you know, what I'm feeling are the facts. I don't have any problem voicing my opinion in a constructive way.

MR. CLOWARD: Similarly are you willing to listen? That maybe you're part of the majority on an issue, but there's a couple people that see things differently. Are you willing to listen to their point of view as well so that everybody has a voice or are you the type that is going to say, hey, come on. You know, the rest of us see it this way. You know, you better just get in line.

PROSPECTIVE JUROR NUMBER 40: No. I'm absolutely reasonable. I like to listen to everybody's angle.

MR. CLOWARD: Great. Thank you.

THE COURT: Mr. Rands?

MR. RANDS: Good morning.

PROSPECTIVE JUROR NUMBER 40: Good morning.

MR. RANDS: All but the good morning. Sounds like you have empathy for your fellow men.

PROSPECTIVE JUROR NUMBER 40: I would agree.

MR. RANDS: And sometimes that, I mean, that's a good thing, but sometimes it can override facts. It can override other issues that you may have.

Is that something that you feel like you could deal with if you were called -- if you were asked to be a juror here?

PROSPECTIVE JUROR NUMBER 40: Yeah. Absolutely.

MR. RANDS: And the reason I say that is you've mentioned that you feel like, you know, it's important that you compensate to the Plaintiff for his injury and for the mental and emotional issues that it's caused or that he claims that it's caused. But at the end of the day if the evidence --

if you feel the evidence shows that that's not worth a million dollars, would you have any problems saying yes, you're going to get some money but it's going to be a lot less than what you asked for?

PROSPECTIVE JUROR NUMBER 40: I wouldn't have any problem with that. Again, it's -- to me it would be based on what we're seeing as facts.

MR. RANDS: Okay. What the evidence shows?

PROSPECTIVE JUROR NUMBER 40: And what the evidence shows, yeah.

MR. RANDS: And do you think that because somebody is injured they're entitled just to shut down, say I'm injured, now come pay me?

PROSPECTIVE JUROR NUMBER 40: No. I don't feel that that's the case either. Again, you know, it depends on facts and try to make a reasonable judgment of what someone in that situation would -- should try to do.

MR. RANDS: And, you know, unfortunately if somebody is hurt, they still have to life the rest of their life, correct?

PROSPECTIVE JUROR NUMBER 40: Sure. Absolutely.

MR. RANDS: And they have to do the best they can do. Is that correct?

PROSPECTIVE JUROR NUMBER 40: Yeah. I agree.

MR. RANDS: Would you agree with me?

PROSPECTIVE JUROR NUMBER 40: I would, yeah.

MR. RANDS: Okay. I believe you said you'd been in a minor car accident?

PROSPECTIVE JUROR NUMBER 40: Yeah. Minor, very minor.

MR. RANDS: And did you file a lawsuit on that?

PROSPECTIVE JUROR NUMBER 40: No.

MR. RANDS: Did you make a claim?

PROSPECTIVE JUROR NUMBER 40: Yeah. Filed through my insurance, yeah.

MR. RANDS: Sure.

PROSPECTIVE JUROR NUMBER 40: Sure.

MR. RANDS: The insurance took care of it? Is that correct?

PROSPECTIVE JUROR NUMBER 40: That's correct, yes.

MR. RANDS: You've said that you were -- or you've told us that you're in the finance world, I guess I'll call it?

PROSPECTIVE JUROR NUMBER 40: Yeah.

MR. RANDS: And, you know, sometimes in this area particularly, they have what I'd like to call the casino mentality where people don't value a dollar. You know, they -- people win megabucks. They win millions all over the place, and sometimes people don't put the value on a buck.

You can put the value on a buck, can't you?

PROSPECTIVE JUROR NUMBER 40: I feel like I can, yes.

MR. RANDS: You know, sometimes it's easy to make money and sometimes it's awfully hard.

PROSPECTIVE JUROR NUMBER 40: Yes. Absolutely.

MR. RANDS: Depending on what the market's doing, and I

guess I haven't been watching it too closely. But the last few days have been kind of a roller coaster, haven't they?

PROSPECTIVE JUROR NUMBER 40: Absolutely.

MR. RANDS: You said you liked to read and involved with self-help and those type of things?

PROSPECTIVE JUROR NUMBER 40: Uh-huh. Absolutely.

MR. RANDS: What other kind of things do you like to read? Other areas?

PROSPECTIVE JUROR NUMBER 40: I spend a lot of time on market news, mostly Bloomberg, a lot of CNBC. Outside of that I coach soccer and play soccer, so I spend a lot of time doing stuff in that regard as well, so.

MR. RANDS: What level do you coach?

PROSPECTIVE JUROR NUMBER 40: I coach club here in Las Vegas for the last couple of years and I've coached -- started my own club in Phoenix for -- had a club down there for about four years, so.

MR. RANDS: And what age group is that?

PROSPECTIVE JUROR NUMBER 40: I've had all age groups. Most recently it's been 16-year-old girls.

MR. RANDS: Is that your daughter?

PROSPECTIVE JUROR NUMBER 40: That's my daughter.

MR. RANDS: So your daughter wants to play soccer and dad gets to be the coach.

PROSPECTIVE JUROR NUMBER 40: Yeah, which I would prefer because it gives me a lot of great time with her.

MR. RANDS: It does. It gives you a lot of --

PROSPECTIVE JUROR NUMBER 40: Absolutely.

MR. RANDS: I dealt with that with my daughters. I had three daughters, too, and you kind of get involved --

PROSPECTIVE JUROR NUMBER 40: A great experience.

MR. RANDS: Probably the only dad at the JV game watching the cheerleaders. It wasn't a creepy thing. It was my daughter. But that's what makes it nice because you can take an afternoon and go spend some time with the kids.

PROSPECTIVE JUROR NUMBER 40: Yeah. We get a lot of time together.

MR. RANDS: Let me look at my --

Excuse me, Your Honor. Just give me a minute, please.

Do you believe that just because somebody brings a case in court they're entitled money?

PROSPECTIVE JUROR NUMBER 40: No.

MR. RANDS: And do you believe just because they're injured they're entitled to a lot of money?

PROSPECTIVE JUROR NUMBER 40: No. I don't believe that.

MR. RANDS: Okay. You'd listen to the evidence and --

PROSPECTIVE JUROR NUMBER 40: Absolutely.

MR. RANDS: -- make a reasoned decision?

PROSPECTIVE JUROR NUMBER 40: Absolutely.

MR. RANDS: Based upon all the evidence presented?

PROSPECTIVE JUROR NUMBER 40: Yes.

MR. RANDS: And the -- as I've talked, some of the other jurors, you know, you recognize that as the Defendant everything we say has to come last. So you're going to hear all the Plaintiff's stuff first and then what evidence or witnesses we may want to bring second. Do you believe you can wait until you hear the entirety of the case before you make your decision?

PROSPECTIVE JUROR NUMBER 40: I do, yes.

MR. RANDS: And sometimes, it happens, the jurors will hear something. They'll say well, that son of a gun, you know what? You know, that's terrible. We're going to, you know, and then they hear something else later on in the case that may affect that. And that just happens.

Will you agree to wait until the entirety of the case is in before you make your decision?

PROSPECTIVE JUROR NUMBER 40: Yeah. Absolutely.

MR. RANDS: Thank you for your time.

THE COURT: Mr. Sibelrude, sir? Will you introduce yourself, please?

PROSPECTIVE JUROR SIBELRUDE: I'm sorry, ma'am?

THE COURT: Will you introduce yourself, please, sir?

PROSPECTIVE JUROR SIBELRUDE: My name is Daniel Sibelrude. I've lived in Clark County for 68 years. I went to the Navy for four years and some college education at UNLV -- just courses. I am retired. I used to work for NCR Corporation for 32 years and I worked for ADIA for another eight years. I'm married. We've been married 53 years, and I have two children. One a girl and one boy. The girl works for Boulder City

Hospital in the admin department. She used to work for USPI, which is another hospital for almost 20 years. And my son, he's a Metro police officer for 20 years.

THE COURT: All right. Sir, have you ever served as a juror before?

PROSPECTIVE JUROR SIBELRUDE: Years ago.

THE COURT: Do you remember if it was a criminal case or a civil case?

PROSPECTIVE JUROR SIBELRUDE: I can't remember. It's been that long. I thought I was retired from jury duty.

THE COURT: So you -- you know what, sir? Actually, if you do not want to be here I will excuse you, so it's up to you.

PROSPECTIVE JUROR SIBELRUDE: I have Parkinson's Disease and at my age right now I'm going through a little bit of health problems, so.

THE COURT: So do you want to be excused, sir?

PROSPECTIVE JUROR SIBELRUDE: Well, I would --

THE COURT: Because by statute, it's really up to you at this point.

PROSPECTIVE JUROR SIBELRUDE: I would appreciate it, yes.

THE COURT: All right, sir. You have a good afternoon. You can go ahead and go back to jury services. Thank you for --

PROSPECTIVE JUROR SIBELRUDE: Thank you.

THE CLERK: In seat number 14, will now be badge number 43,

Karine Adamyan.

THE COURT: Ma'am, come on up and if you'll introduce yourself, please?

PROSPECTIVE JUROR NUMBER 43: Hi. First of all, I want to apologize because my English is bad. And also, I don't know if I might need translations.

THE COURT: Okay. Seems like you're doing okay so far. So why don't you go ahead and introduce yourself. Just answer the questions on that card.

PROSPECTIVE JUROR NUMBER 43: Okay. So I'm Karine Adamyan. I moved to Nevada in 2003. I have three kids. I have a husband. He is working on the cab driver. And my two -- my eldest daughter is like a working in the heart center hospital in my country. She's not here yet. And my youngest daughter is taking care of her two little kids. And my son is denture technician.

THE COURT: And what do you do for a living?

PROSPECTIVE JUROR NUMBER 43: And I'm working at the Jockey Club as a hospitality operator.

THE COURT: Go ahead and have a seat, ma'am. Have you ever served as a juror before?

PROSPECTIVE JUROR NUMBER 43: No.

THE COURT: Have you ever been a party to a lawsuit or a witness in a lawsuit before?

PROSPECTIVE JUROR NUMBER 43: No.

THE COURT: Have you or anyone close to you worked in the

legal field?

PROSPECTIVE JUROR NUMBER 43: Legal?

THE COURT: Yeah. Any lawyers, paralegals, anything like that?

PROSPECTIVE JUROR NUMBER 43: No.

THE COURT: Have you or anyone close to you had medical training or worked in the medical field?

PROSPECTIVE JUROR NUMBER 43: You mean if my daughter is working that's it?

THE COURT: Your daughter, anyone else doctors, nurses, anything like that?

PROSPECTIVE JUROR NUMBER 43: My son is a denture technician.

THE COURT: Okay. And has anyone close to you had a serious injury?

PROSPECTIVE JUROR NUMBER 43: I had a serious injury. I broke my spine during an accident. And I was with my husband. He was the driver.

THE COURT: How long ago was that, ma'am?

PROSPECTIVE JUROR NUMBER 43: It was in 2012. I spent three days in the hospital and then I was out of my job for about four or five months. And then I went back but I couldn't work because of my back. And I changed my place in the same department, but then I changed it again because it was not good either. So I went to hospital.

THE COURT: All right. Other than what you just mentioned,

have you or anyone close to you been in a car crash?

PROSPECTIVE JUROR NUMBER 43: I had another car crash, but it was not a big thing.

THE COURT: Can you wait to form an opinion until you've heard all of the evidence?

PROSPECTIVE JUROR NUMBER 43: I'll try.

THE COURT: Could you follow the instructions on the law that I give you even if you don't personally agree with them? So could you follow the law even if you were writing the law you would write a different law? Could you follow the law that I -- in the instructions that I give you?

PROSPECTIVE JUROR NUMBER 43: I think, yeah.

THE COURT: Could you set aside any sympathy you may have for either side and base your verdict solely on the evidence and the instructions on the law presented during the trial?

PROSPECTIVE JUROR NUMBER 43: If I understand right, I have to have the evidence to make a decision?

THE COURT: Yes. So you can make a decision based on the evidence and not sympathy?

PROSPECTIVE JUROR NUMBER 43: Yeah.

THE COURT: Is there any reason why you couldn't be completely fair and impartial if you were selected to serve as a juror in this case?

PROSPECTIVE JUROR NUMBER 43: Yeah.

THE COURT: What is your concern, ma'am?

PROSPECTIVE JUROR NUMBER 43: To be fair?

THE COURT: Do you think you could be fair?

PROSPECTIVE JUROR NUMBER 43: I think so.

THE COURT: Okay. If were a party to the case, would you be comfortable having someone like yourself as a juror?

PROSPECTIVE JUROR NUMBER 43: I wouldn't be I don't want to play with the lives of people, like to change their life to bad. I don't know.

THE COURT: Mr. Cloward?

MR. CLOWARD: Thanks, Judge.

How are you today?

PROSPECTIVE JUROR NUMBER 43: Good, thank you. How are you?

MR. CLOWARD: Doing well. And it's Adamyan?

PROSPECTIVE JUROR NUMBER 43: Adamyan.

MR. CLOWARD: Adamyan. Okay. So can I ask you some follow up questions? You mentioned that it -- you really wouldn't like to be -- tough to make a decision that affects people's lives. Even though it's -- I'm sure it's tough for everybody. Is that something that you're willing to do?

PROSPECTIVE JUROR NUMBER 43: I actually don't like to be in this buildings about judging and I don't like to judge people. And maybe my decision is not right. I don't know, so that's why I don't want to play with the lives of others.7

MR. CLOWARD: Is it something that you would be willing to do though, that you would be willing to listen to the evidence and hear both sides and deliberate with your fellow jurors?

PROSPECTIVE JUROR NUMBER 43: Yeah. I would do that. I can hear both sides and if there is an evidence that proves that which side is right, I'll do that.

MR. CLOWARD: Okay. Great. Tell me a little bit about -- sounds like you had a pretty serious car crash?

PROSPECTIVE JUROR NUMBER 43: Yeah. We had a car crash, but we had no -- it was hit and run. And we claimed, but no one of the attorneys took that case.

MR. CLOWARD: Because there was no other person -- you couldn't find that person that caused it?

PROSPECTIVE JUROR NUMBER 43: Yeah. Yeah. So we just left.

MR. CLOWARD: Are you doing okay now?

PROSPECTIVE JUROR NUMBER 43: I'm having still pain in my back, but I can live with it.

MR. CLOWARD: Sure. Is there anything about that experience that maybe you might be unfair to the Defendant or to my client, you think?

PROSPECTIVE JUROR NUMBER 43: I don't know. What is the case about? What I can say?

MR. CLOWARD: Sounds like you want to just wait and hear what the evidence is. Is that fair?

PROSPECTIVE JUROR NUMBER 43: I think so.

MR. CLOWARD: Okay. Was there anything that was discussed that you felt strongly about that you, maybe you wanted to talk to either myself or Mr. Gardner about?

PROSPECTIVE JUROR NUMBER 43: No.

MR. CLOWARD: Nothing? Okay. Is there anything that you feel like might be important for us to know about you or your family or your life experiences that might be important?

PROSPECTIVE JUROR NUMBER 43: I don't think so.

MR. CLOWARD: I appreciate your insight. Is there anything maybe an experience that you've had in life where you felt like you could have handled it differently?

PROSPECTIVE JUROR NUMBER 43: Handled what?

MR. CLOWARD: Have you ever had something hard an experience that was hard for you to go through, but you look back on it now and you kind of say to yourself, you know, I could have handled that differently?

PROSPECTIVE JUROR NUMBER 43: I don't think about that I think it -- I could handle it differently, but I've passed a very hard life before moving to America. And the first years when I moved to America it was a very hard life for me. But now, I think everything's going good.

MR. CLOWARD: Great. That's good to hear. Well, thank you for talking to me. I appreciate it.

Thank you, Judge.

THE COURT: Mr. Rands?

MR. RANDS: Morning.

PROSPECTIVE JUROR NUMBER 43: Good morning.

MR. RANDS: Where did you come from?

PROSPECTIVE JUROR NUMBER 43: I came from Armenia.

MR. RANDS: Armenia?

PROSPECTIVE JUROR NUMBER 43: Armenia.

MR. RANDS: I thought with the Y-A-N it was probably Armenia, but it's usually a clue with the Y-A-N on the end of your name. But my concern, frankly, is that, you know, you've been involved in an accident and you told Mr. Cloward that it was a hit and run. And you weren't able to track somebody down to seek recovery for that accident. The attorneys wouldn't help you. I represent the Defendant in this case, and my concern is that you might be a little bit more prone to believe the Plaintiff because of your experiences. Do you know -- do you see what I'm saying?

PROSPECTIVE JUROR NUMBER 43: Uh-huh [affirmative response].

MR. RANDS: Would you --

PROSPECTIVE JUROR NUMBER 43: Like --

MR. RANDS: Do you think you'd have some sympathy for the Plaintiff because he was hurt or we'll say he was hurt in an accident also?

PROSPECTIVE JUROR NUMBER 43: I didn't --

MR. RANDS: Excuse me?

PROSPECTIVE JUROR NUMBER 43: I don't understand.

MR. RANDS: Okay. Do you think you will feel like because he was involved in an accident he should recover money because of your experience?

PROSPECTIVE JUROR NUMBER 43: Oh, no. It doesn't matter because we are different. These cases are different.

MR. RANDS: So you could listen to all the evidence, and if, at

the end of the day, you didn't feel like he's proven his case that he gets $2 million or whatever he's going to ask for; you could maybe give him less?

PROSPECTIVE JUROR NUMBER 43: Maybe he deserved, if his evidence is all there and they prove, so he will deserve it.

MR. RANDS: But if they don't prove it --

PROSPECTIVE JUROR NUMBER 43: If they don't, he won't deserve it.

MR. RANDS: And you said you have a little bit of trouble with English. Have you understood everything so far?

PROSPECTIVE JUROR NUMBER 43: I couldn't go to the college. I went, but I left later because I had to work and my time wasn't matching with the college time. And I couldn't leave my work because I had to send money to my kids who were in Armenia at that time.

MR. RANDS: And I didn't -- I couldn't -- you have kind of a soft-spoken voice. And I didn't hear my -- when he said he's 39. I'm almost 60, so I'm a little bit older than him. But the ears aren't quite what they used to be, okay? I've had people tell me I don't look 60. I like to hear that, but the grey hair gives me away. But at least I have hair, so.

MR. CLOWARD: Your Honor, objection. There must be an objection there at some point.

MR. RANDS: But I didn't hear what your children do for a living. What do they do?

PROSPECTIVE JUROR NUMBER 43: Right now?

MR. RANDS: Yes.

PROSPECTIVE JUROR NUMBER 43: My son is a denture

technician.

MR. RANDS: Oh, denture technician. Okay.

PROSPECTIVE JUROR NUMBER 43: Yes. My youngest daughter, she's taking care of her kids.

MR. RANDS: Good.

PROSPECTIVE JUROR NUMBER 43: But my eldest is still in my country. She will be here in several months, but she's working in the heart center.

MR. RANDS: In Armenia?

PROSPECTIVE JUROR NUMBER 43: In Armenia.

MR. RANDS: Okay. Is she coming here permanently?

PROSPECTIVE JUROR NUMBER 43: She's coming here, yes, to stay.

MR. RANDS: Good. So you'll have your whole family together then.

PROSPECTIVE JUROR NUMBER 43: Yes. Finally.

MR. RANDS: That's a good thing.

PROSPECTIVE JUROR NUMBER 43: After eight-nine years.

MR. RANDS: But again, have you understood what we've talked about so far, as far as the English goes?

PROSPECTIVE JUROR NUMBER 43: Yeah, but you know I don't know sometimes there are things that I don't understand and it may affect the decision or --

MR. RANDS: In this case there will be a lot of medical terminology. Do you understand -- do you have any background in medical

terminology? No? Okay.

PROSPECTIVE JUROR NUMBER 43: No.

MR. RANDS: I didn't either until I started this job, but it's -- and what do you think about damages for pain and suffering?

PROSPECTIVE JUROR NUMBER 43: Damages. You know, once my sister-in-law got in an accident and accident it means it wasn't a car crash. She was just walking her dog outside. And other people's dogs, two people's attacked her. And teared apart her dog and she had some bites and bruises and no one took care of her.

MR. RANDS: Okay. Would that make you feel --

PROSPECTIVE JUROR NUMBER 43: And she changes maybe two, three, four years, you know, and compensate her saying that the guy who owned the dogs, he had no money. And she paid all her medical bills on her.

MR. RANDS: So do you feel like if somebody comes into court and they've been injured they need to be paid?

PROSPECTIVE JUROR NUMBER 43: If there was an injury, of course. She spent so much money on her medical bills.

MR. RANDS: Just because --

PROSPECTIVE JUROR NUMBER 43: It wasn't her fault.

MR. RANDS: Just because she was injured she needs to be paid?

PROSPECTIVE JUROR NUMBER 43: Of course.

MR. RANDS: Okay. Thank you.

THE COURT: All right. Folks, we're going to go ahead and

break for lunch. During this break you are admonished not to talk or converse among yourselves or with anyone else on any subject connected with the trial; or read, watch, or listen to any report or commentary on the trial, or any person connected with this trial by any medium of information including, without limitation; newspapers, television, internet, and radio; or form or express any opinion on any subject connected with the trial until the case is finally submitted to you. I remind you not to do any independent research. And we will come back at 1:15.

THE MARSHAL: Please rise for the jury.

[Potential jury exits at 11:45:22 a.m.]

[Outside the presence of the potential jury.]

THE COURT: All right. Mr. Cloward?

MR. CLOWARD: Yeah. Your Honor, I have a cause challenge for Mr. Hall. Upon the Court's questioning, not even upon my questioning, he pointed out that he would be fair to the Defendant. And I got up and asked him. I said, you know, you didn't mention the Plaintiff. Do you feel like you would not be fair to the Plaintiff, and he says, no, I would not be fair.

And then I asked him well, you know, why don't you explain for us what your thoughts are, why you wouldn't be fair, and he basically went through his personal life experiences in managing, you know, a casino and having lots of claims. Matter of fact, he had one last night. And that he feels like, you know, the majority of those are frivolous and that they pay out just to pay out even when they shouldn't pay out.

Also indicated that even if the facts in evidence were proved by Mr. Morgan that he would hold down damages based on his experience.

And I just think he made a very clear record that, you know, he can't be fair to my client.

THE COURT: Mr. Rands?

MR. RANDS: I like him.

THE COURT: I'm sure you do.

MR. GARDNER:

MR. RANDS: I don't have anything to say. I mean, clearly he was --

THE COURT: So we'll be excusing Mr. .Hall for cross.

MR. RANDS: He was clearly -- clearly what Mr. Cloward said.

THE COURT: Anything else?

MR. RANDS: I would also like to make a challenge for cause for Ms. Adamyan. Number 43.

THE COURT: All right.

MR. RANDS: I believe, in again, in answer to the Court's questions, she said she wouldn't want to -- the people or the parties to have her as a juror. And in answer to my questions, I think it was clear that she really didn't understand the English language well. I mean, I asked her a question. She went completely off on a different answer. And then at the end, she said, just because somebody's injured they need to be compensated. I mean, she said that, and I think that would be prejudicial to the Defense in the case. And I would like her removed for cause.

THE DEFENDANT: Your Honor, in response, I think she professed to have a difficulty with the English language, however, when you look at the totality of the circumstances as Sanders [indiscernible] requires

us to do, she answered all the questions. She didn't say I don't understand. So it's clear that she has a very good grasp of the English language.

One of the thing that I think should be highlighted at the end when Counsel was asking questions about well, you know, just because your sister was hurt, do you think that she should be compensated? Something she said was very important. She said yes, because it was not her fault. And that's the big distinguishing factor.

Her position is not, hey, just because you're hurt you should get compensated. Her distinction is if somebody else is at fault, then there should be compensation. So she is not the -- an individual. She didn't express anything that says, hey, just because we're here, we automatically win. And I think that every juror expressed some hesitancy about judging other people. I mean, that's not an easy thing for people to do.

There's going to be a winner. There can be a loser. And she just expressed I don't like to judge people. But she never said that I'm not willing to do it. Instead she said, I'm willing to listen to the facts and the evidence. And so I disagree strongly. I don't think she said anything that would rise to the level of a cause challenge at all.

MR. RANDS: And I do disagree totally. Her last question was clearly and you believe just because somebody's injured they need to be compensated and she said yes.

THE COURT: All right. So I'm going to grant the challenge for cause with respect to Mr. Hall. I'm on the fence with Ms. Adamyan. I think given her -- some of her struggles, and she really -- was really pretty good, but she ran into some trouble in some of the more complicated concepts or

complicated phrasing of things.

And so I have some concerns on that regard perhaps more so than concerns about her opinions. Because I think that she really didn't seem to be particularly for one side or the other to me. Just seemed like sometimes she wasn't precisely understanding the question even though I think her English was, you know, really, not terrible. So I'm just concerned about that, so for that reason, I'm going to grant the cause challenge for her.

So when we come back, I'm hoping we can get through the next couple in, you know, 30 minutes or so and have a jury by 2:00, still do openings and start with a witness.

How long do you anticipate your opening, Mr. Cloward?

MR. CLOWARD: I've practiced a couple times and depends on how long-winded I am. I would say --

MR. RANDS: Two hours.

MR. CLOWARD: -- for sure no longer than an hour.

THE COURT: All right.

MR. CLOWARD: Worse case, I mean, it's for sure, no longer than --

THE COURT: Okay. Fair enough.

MR. GARDNER: I'm probably half an hour, 45 minutes, maybe.

THE COURT: Okay. So we should -- we'll see. We'll see if we get to a witness. You have a witness, right, Mr. Cloward, just in case?

MR. CLOWARD: Yes. Dr. Coppell is planning on being here at 2:00, so.

THE COURT: So let's try real hard to get to him.

THE COURT: -- in case number A718679, Morgan versus Lujan. Let the record reflect the presence of all of our prospective jurors, counsel and parties.

Okay. So I'm going to ask the following folks to return to jury services: Mr. Hall, sir, and Ms. Adamyon. Is that correct? All right. Thank you. You two have a good afternoon. Thank you so much for your time.

PROSPECTIVE JUROR NO. 43: I can move?

THE MARSHAL: Yes.

THE COURT: Yep. Yes, ma'am. Thank you.

PROSPECTIVE JUROR NO. 43: Thank you.

THE COURT: Enjoy your game, sir.

PROSPECTIVE JUROR NO. 039: Thank you very much. I'm excited. I just don't want to put in the dirt.

THE CLERK: In seat number 8, badge number 44, John Turner. And in seat number 14, Derick Bledsoe, badge number 46.

THE COURT: Mr. Turner, sir, if you will introduce yourself, please.

PROSPECTIVE JUROR NO. 44: Good afternoon. I'm John Turner. I've lived in Clark County since 2004. A couple of years of college back in Ohio. Self-employed currently. I do IT work, but for the past year, I've been doing my own little thing. I work for Uber, I DJ on the side, so I'm doing that. I am currently married, but I'm currently getting a divorce. I have a 26-year-old daughter from my previous marriage.

THE COURT: What does she do, the 26-year-old?

PROSPECTIVE JUROR NO. 44: Pharmacy tech.

THE COURT: Okay. Sir, go ahead and have a seat. Have you ever served as a juror before?

PROSPECTIVE JUROR NO. 44: No.

THE COURT: Have you been a party to a lawsuit or a witness in a lawsuit before?

PROSPECTIVE JUROR NO. 44: No.

THE COURT: Have you or anyone close to you worked in the legal field?

PROSPECTIVE JUROR NO. 44: No.

THE COURT: Other than your daughter that you already mentioned, have you or anyone close to you had medical training or worked in the medical field?

PROSPECTIVE JUROR NO. 44: No.

THE COURT: Have you or anyone close to you had a serious injury?

PROSPECTIVE JUROR NO. 44: Yes.

THE COURT: Can you tell me about that?

PROSPECTIVE JUROR NO. 44: My brother was shot in the face.

THE COURT: Oh, I'm sorry to hear that.

PROSPECTIVE JUROR NO. 44: I mean, he's doing fine now, but --

THE COURT: How long ago was that?

PROSPECTIVE JUROR NO. 44: A little over 20 years ago, but he's actually still getting surgeries for that.

THE COURT: All right. Have you or anyone close to you been in a car crash?

PROSPECTIVE JUROR NO. 44: No.

THE COURT: Can you wait to form an opinion until you've heard all of the evidence?

PROSPECTIVE JUROR NO. 44: Yes.

THE COURT: Can you follow the instructions on the law that I give you, even if you don't personally agree with them?

PROSPECTIVE JUROR NO. 44: Yes.

THE COURT: Can you set aside any sympathy you may have for either side and base your verdict solely on the evidence and the instructions on the law presented during the trial?

PROSPECTIVE JUROR NO. 44: Most likely, yes.

THE COURT: Is there any reason you couldn't be completely fair and impartial if you were selected to serve as a juror?

PROSPECTIVE JUROR NO. 44: No.

THE COURT: And if you were a party to this case, would you be comfortable having someone like yourself as a juror?

PROSPECTIVE JUROR NO. 44: Again, that will be a most likely.

THE COURT: Okay. Mr. Cloward.

MR. CLOWARD: Thank you. Mr. Turner, how you doing today?

PROSPECTIVE JUROR NO. 44: Doing fine.

THE COURT: You almost made it.

PROSPECTIVE JUROR NO. 44: Almost made it.

THE COURT: What was the -- I guess, what's the most important thing that's been discussed so far that -- to you?

PROSPECTIVE JUROR NO. 44: Most likely -- it definitely is the amount of damages that the guy is receiving.

MR. CLOWARD: Okay. Tell me about that.

PROSPECTIVE JUROR NO. 44: I guess, since the '90s, I've just heard so many frivolous lawsuits.

MR. CLOWARD: Sure.

PROSPECTIVE JUROR NO. 44: For me, going back to McDonald's, you know, the hot coffee. Someone spilled it and then sued and get millions of dollars for it, for something that they did.

MR. CLOWARD: Yeah, sure.

PROSPECTIVE JUROR NO. 44: And, you know, the lawsuits that are being passed around today or, you know, the me-toos, and all that, you never know what's real or, you know, if what they're asking for is legit.

MR. CLOWARD: Yeah. Do you have a perception that the majority of lawsuits nowadays are frivolous?

PROSPECTIVE JUROR NO. 44: From what I'm hearing on the news, the [indiscernible] hearing what he -- you know, some of the things that he listens to on like CNN, and things like that. You know, I'm on CNN every day. I got it on my -- on the app on my phone, you know, it's a lot of these things that you hear, you know, I would tend to think that a lot of them are not true.

MR. CLOWARD: I'm sorry, a lot of them are what?

PROSPECTIVE JUROR NO. 44: Not true.

MR. CLOWARD: Not true.

PROSPECTIVE JUROR NO. 44: Yeah. Whether they're just in it for the money.

MR. CLOWARD: Meaning, frivolous --

PROSPECTIVE JUROR NO. 44: Correct.

MR. CLOWARD: -- basically?

PROSPECTIVE JUROR NO. 44: Yes.

MR. CLOWARD: Yeah, I can appreciate that. How do you think that the jurors in those cases got off track? What would it be?

PROSPECTIVE JUROR NO. 44: I truly do not know. You know, some of the things that -- well, for me, that appears to like a cut case, you know, it falls a different way. I mean, true, I don't know the -- you know, the particulars with everything, but, you know, I guess that's the -- that's -- you know, that's where it gets [indiscernible].

Now, with him here, I don't know the particulars, but --

MR. CLOWARD: Is that --

PROSPECTIVE JUROR NO. 44: -- but I mean, getting back to that. I do agree that if something were to -- if someone were to do something, you know, illegal or -- and, you know, it's proven that it needs to be paid or, you know, that the amount is what it is, then sure. But I just hear about it so much that I tend not to believe anything.

MR. CLOWARD: And I guess, we've all heard of those cases.

PROSPECTIVE JUROR NO. 44: Sure.

THE COURT: We've all heard of, you know, the McDonald's

case, we've all heard of the, you know, the cases like the -- I think there was one against Wendy's a few years ago, the pants suit case. And I'm curious to know whether we start off with a strike against us just because we're here and the amount that we talked about is a lot of money. There's no question it's a lot.

PROSPECTIVE JUROR NO. 44: Yeah.

MR. CLOWARD: And that's why, you know, I talk about it, is there's -- you know, I promise to be brutally honest back, you know, and I just want to find out if, you know, it's going to be harder for Aaron to prove his case because it's this type of case versus if this was a contract case that only had to do with, hey, do I get -- you know, should this person have to, you know, follow through with what we promised to. Maybe a case like that might not be -- the party might not start off at a different spot. Do you see where I'm going with that?

PROSPECTIVE JUROR NO. 44: Right.

MR. CLOWARD: Could I ask you to search in your heart and be brutally honest with me, if Aaron starts off differently because of your experiences?

PROSPECTIVE JUROR NO. 44: And when you say "starting off", you mean --

MR. CLOWARD: Sure.

PROSPECTIVE JUROR NO. 44: -- what, just immediately just telling us what -- [indiscernible].

MR. CLOWARD: I guess, are you already to a sport where --

PROSPECTIVE JUROR NO. 44: Oh.

MR. CLOWARD: -- you already don't believe that this case has merit just based on the fact that we're here, and that we talked about a lot of money?

PROSPECTIVE JUROR NO. 44: It's not that I don't believe.

MR. CLOWARD: Okay.

PROSPECTIVE JUROR NO. 44: It's that from everything that I've heard for 20 so years, my opinion is -- especially when you have a large amount like that, that it shouldn't have to be that much.

MR. CLOWARD: Okay.

PROSPECTIVE JUROR NO. 44: I'm not saying that it's -- that what happened to him is not -- you know, he's trying to get more than what he should, but, you know --

MR. CLOWARD: Can I ask you a really brutally honest question?

PROSPECTIVE JUROR NO. 44: No.

MR. CLOWARD: No, I can't?

PROSPECTIVE JUROR NO. 44: I'm just playing.

MR. CLOWARD: Okay. The fact that we've -- that I've told you the amounts that we're going to ask for, do you already believe that we're overreaching, that no matter what the evidence is, we're already hear in bad faith?

PROSPECTIVE JUROR NO. 44: I don't -- I'm at a point where, without knowing the actual -- what happened with him, because it could be -- I'm looking at him, he looks fine.

MR. CLOWARD: Sure.

PROSPECTIVE JUROR NO. 44: And then again, that's, you know, subjective. I don't know if something happened to his family or anything like that. So at this point, I don't know. But until then, until I've -- you know, I can hear the facts, from what I believe and what I've been brought up to believe, not that you're guilty and you have to prove your innocence, but for that amount of money, yeah.

MR. CLOWARD: So you feel that we're already kind of overreaching; is that fair?

PROSPECTIVE JUROR NO. 44: I don't want to say it exactly like that, but kind of, yes.

MR. CLOWARD: Okay. Well, I certainly don't want to misrepresent or mischaracterize. I want to make sure that we have true communication, where I fully understand where you're coming from. Could you help me to understand a little better using maybe your words if how you feel versus when?

PROSPECTIVE JUROR NO. 44: Well, a lot of this has, you know, to do with -- with my brother.

MR. CLOWARD: Okay.

PROSPECTIVE JUROR NO. 44: He was shot. They never found who shot him. And, true, he was doing something that he wasn't supposed to be doing and he went to jail for eight years, you know, after being shot, you know, after all the surgeries that he had to have. And there was no justice for him for that. You know, it's like they -- you know, they didn't want to pursue it for some reason. I don't know.

And then my wife, she has some issues, you know, as well. So

I -- it's personal, you know, from the things that I hear from family and everything. So that's where I coming from. And then a lot of the things that I hear.

MR. CLOWARD: Okay. I appreciate your many views. Thank you. Thank you for sharing that.

What else was important that we talked about the last day and a half that, you know, was important to you and you wanted to kind of talk about?

PROSPECTIVE JUROR NO. 44: Nothing that important. Nothing that I can think of. I mean, I know that things happen. And I know that I'm not one of those people that, you know, if someone were to do something, then, yeah, they need to pay for it or they need to be fair about it. You know, everyone needs to be fair, that's all.

MR. CLOWARD: Sure, sure. And I appreciate your views on that, certainly. I have my outline, but I wrote this on notecards, so I forget.

Have you always dealt with things in your life in the way that you look back and you're like, you know what, I handled that perfectly, or have you ever had situations where maybe you look back and you could have done things differently?

PROSPECTIVE JUROR NO. 44: Oh, yeah. The way that me and my ex-wife broke up and, you know, not that I left my daughter out, but I've always been in contact with her. You know, I think I could have done that a lot differently. You know, we're -- I mean, we're all in good spirits now and, you know, everyone is friends and everything, but it was pretty rough back then. I think -- well, I know I could have handled that better.

MR. CLOWARD: Uh-huh. Do you have expectations that other people handle things a certain way or are you more understanding that --

PROSPECTIVE JUROR NO. 44: I believe everyone is -- has -- handles things differently. The way they [indiscernible] and the way that I might handle something is not the way they might handle something. But that's -- you know, that's how they handle it and that's the best way for them.

MR. CLOWARD: Okay. Thank you. Appreciate it.

MR. RANDS: Good afternoon, Mr. Turner.

PROSPECTIVE JUROR NO. 44: Hello.

MR. RANDS: I'm name is Doug Rands and I think you've heard that maybe --

PROSPECTIVE JUROR NO. 44: Yes.

MR. RANDS: -- over the last day or so, but I'm one of the Defendant -- representatives of the Defendant.

PROSPECTIVE JUROR NO. 44: Yes.

MR. RANDS: I want to talk to you a little bit. You indicated that you have some concerns about, you know, money damages and things like that, and I understand that. But I think you had also admitted and everybody is in the same boat, you really don't know what this case is about yet, right?

PROSPECTIVE JUROR NO. 44: That's true.

MR. RANDS: You don't know what the damages are or the allegations of damages, other than what you've heard here, which is really nothing. Will you admit that?

PROSPECTIVE JUROR NO. 44: I do.

MR. RANDS: Okay. And part of the trial is to listen to the

evidence and make a decision after you've heard the evidence. Do you understand that?

PROSPECTIVE JUROR NO. 44: I do understand.

MR. RANDS: So at some point in the next several days, if you've chosen to be on the jury, there's going to be evidence that's going to come in through testimony, there'll be witnesses who come up and testify, and then other witnesses. And then at the end, the attorneys are allowed to make argument as to what the evidence showed and you can -- and at that point, the jury gets the case and make the decision. That's kind of what happens.

Now, there may be something that comes into this trial that you say, okay, I don't think so, but you can -- you know, there may be something that will come into trial and you say, okay, you know, damages are warranted; they've proven their damages. And they do have the obligation to do that, they have to prove their damages. If that were to happen at that point, could you make a determination based on a reasonable person?

PROSPECTIVE JUROR NO. 44: Most likely, yes.

MR. RANDS: Okay. And, you know, sometimes -- I mean, it's a difficult thing. I mean, you're having to be basically a judge. You're a judge of the facts as a juror, but you understand that, oftentimes, the evidence will come in one way that will make you believe that this is the amount that should be awarded, or maybe this amount, or maybe this amount, or maybe nothing. That's only based on evidence and, at this point, you can't tell which -- what you would award because you don't know the evidence, right?

PROSPECTIVE JUROR NO. 44: Correct.

MR. RANDS: But at some point, you will hear the evidence, and at that point, do you think you could evaluate the evidence and make a reasonable determination?

PROSPECTIVE JUROR NO. 44: Most likely.

MR. RANDS: Okay. What is -- you said you're self-employed?

PROSPECTIVE JUROR NO. 44: Correct.

MR. RANDS: And that your brother had an issue, but you haven't had any personal medical issues or no auto accidents or anything, which is good. You said your daughter is a pharmacy tech. Where does she work?

PROSPECTIVE JUROR NO. 44: Cleveland Clinic.

MR. RANDS: Excuse me?

PROSPECTIVE JUROR NO. 44: Cleveland Clinic.

MR. RANDS: Okay. And as a pharmacy tech, what does she do?

PROSPECTIVE JUROR NO. 44: She fills prescriptions.

MR. RANDS: Okay. Do you ever talk to her about medical issues or --

PROSPECTIVE JUROR NO. 44: No.

MR. RANDS: Okay. She's not your go-to person, and you say, I've got a problem, I need to -- do I need to see a doctor?

PROSPECTIVE JUROR NO. 44: No.

MR. RANDS: Okay. What do -- what do you like to do for fun?

PROSPECTIVE JUROR NO. 44: Bowl.

MR. RANDS: Bowling?

PROSPECTIVE JUROR NO. 44: Yeah, bowling.

MR. RANDS: Where do you bowl?

PROSPECTIVE JUROR NO. 44: White Rock.

MR. RANDS: Are you in a league?

PROSPECTIVE JUROR NO. 44: No. Either White Rock or San Tan, either one of those two usually.

MR. RANDS: Have you ever bowled a 300 game?

PROSPECTIVE JUROR NO. 44: 299.

MR. RANDS: Oh. That last pin, huh? Oh, that's awful. So what is that, 12 strikes and one nine?

PROSPECTIVE JUROR NO. 44: Yes. No, 11 strikes and a nine.

MR. RANDS: Eleven strikes and a nine. That's brutal.

PROSPECTIVE JUROR NO. 44: Yeah, thanks for reminding me.

MR. RANDS: Oh, no, now I put my foot in, haven't I? Do you like to read or --

PROSPECTIVE JUROR NO. 44: I'm not really into books, but being that I'm an IT tech, I'm always in front of a [indiscernible].

MR. RANDS: Well, what kind of websites do you like to use?

PROSPECTIVE JUROR NO. 44: Well, CNN.

MR. RANDS: Sure.

PROSPECTIVE JUROR NO. 44: Any technology-based sites, since that's what I --

MR. RANDS: Sure.

PROSPECTIVE JUROR NO. 44: -- am normally on to keep up on the technology sort of thing. That's pretty much it.

MR. RANDS: Other than bowling, any other sports?

PROSPECTIVE JUROR NO. 44: If craps is a sport.

MR. RANDS: A sport I'm not very good at.

PROSPECTIVE JUROR NO. 44: Right.

MR. RANDS: Yeah. Somebody once said the casinos weren't built by the winners and I'm a living example of that.

PROSPECTIVE JUROR NO. 44: Bowling and -- when me and my -- well, my soon-to-be ex-wife, we used to go to California [indiscernible], so travel a little bit, so.

MR. RANDS: That's all I have. Thank you for your time.

THE COURT: All right. Mr. Bledsoe, sir, if you'll introduce yourself.

PROSPECTIVE JUROR NO. 46: My name is Derick Bledsoe. I've lived in Clark County for 20 years. I have a doctor of pharmacy degree from Xavier University Louisiana. I'm a pharmacist with Smith's Food & Drug. I'm married. My wife is a retail sales manager. I have two children, 12 and 10.

THE COURT: All right, sir. Have you ever served as a juror before?

PROSPECTIVE JUROR NO. 46: No.

THE COURT: Have you ever been a party to a lawsuit or a witness in a lawsuit before?

PROSPECTIVE JUROR NO. 46: No.

THE COURT: Have you or anyone close to you worked in the legal field?

PROSPECTIVE JUROR NO. 46: No.

THE COURT: And you have medical training and work in the medical field. How about anybody else who's close to you?

PROSPECTIVE JUROR NO. 46: No.

THE COURT: Have you or anyone close to you suffered a serious injury?

PROSPECTIVE JUROR NO. 46: I had an uncle who died in a car accident.

THE COURT: I'm sorry to hear that.

PROSPECTIVE JUROR NO. 46: That was 30-some-odd years ago.

THE COURT: Okay. Anyone else close to you who's been in a car crash for you?

PROSPECTIVE JUROR NO. 46: No, just minor fender-benders for myself.

THE COURT: Can you wait to form an opinion until you've heard all of the evidence?

PROSPECTIVE JUROR NO. 46: Yes.

THE COURT: Can you follow the instructions on the law that I give you, even if you don't personally agree with them?

PROSPECTIVE JUROR NO. 46: Yes.

THE COURT: Can you set aside any sympathy you may have

for either side and base your verdict solely on the evidence and the instructions on the law presented during the trial?

PROSPECTIVE JUROR NO. 46: Yes.

THE COURT: Is there any reason you couldn't be completely fair and impartial if you are selected to serve as a juror?

PROSPECTIVE JUROR NO. 46: No.

THE COURT: If you were a party to this case, would you be comfortable having someone like yourself as a juror?

PROSPECTIVE JUROR NO. 46: Yes.

MR. CLOWARD: Thanks. Mr. Bledsoe, how are you today?

PROSPECTIVE JUROR NO. 46: Good.

MR. CLOWARD: What -- we've been going at this and we're in the home stretch. What's been important for you?

PROSPECTIVE JUROR NO. 46: For me, as echoed by some of the others, I just, in general, feel most personal injury lawsuits are frivolous. That's what I have to say on that.

MR. CLOWARD: Tell me a little bit about that, if you would.

PROSPECTIVE JUROR NO. 46: It's just my opinion. I work in a grocery store. I've seen people see a wet spot on the floor and fake fall and so I -- you know, I've seen that sort of thing happen. I see it kind of -- they see an opportunity for a money grab.

MR. CLOWARD: Okay. Kind of lawsuit lottery type of thing?

PROSPECTIVE JUROR NO. 46: Yeah.

MR. CLOWARD: What are your thoughts about this case?

PROSPECTIVE JUROR NO. 46: I don't know particulars. You

mentioned early on, there might be a large settlement that you're looking for. The amount doesn't matter so much, but I figure, you know, you have to set your sights high and hope you land somewhere, you know, in the middle.

MR. CLOWARD: You think that's what we're doing in this case?

PROSPECTIVE JUROR NO. 46: To an extent.

MR. CLOWARD: What makes you feel that way?

PROSPECTIVE JUROR NO. 46: I think that's what lawyers do.

MR. CLOWARD: All lawyers?

PROSPECTIVE JUROR NO. 46: Most.

MR. CLOWARD: Do you think there are any lawyers that just ask for what's fair?

PROSPECTIVE JUROR NO. 46: Sure.

MR. CLOWARD: What do you think about me?

PROSPECTIVE JUROR NO. 46: I wanted to file a lawsuit against you for pain and suffering yesterday. It was just -- you kept going on about the pie and I was like enough about the pie already.

MR. CLOWARD: I'm sure you could get some -- get these guys to take that case.

PROSPECTIVE JUROR NO. 46: Yeah, yeah.

MR. CLOWARD: I appreciate your honesty. Thank you. Do you think that, on behalf of my client, we're already starting off a little bit behind the Defense?

PROSPECTIVE JUROR NO. 46: I wouldn't say that. It's just you really have to just provide the proof, just prove your case, that -- I

wouldn't say starting off behind, but I'm just of the opinion most of these cases are frivolous. That doesn't mean this one is necessarily. That's just where I stand.

MR. CLOWARD: Do you feel the chances are higher that this is a frivolous case just based on --

PROSPECTIVE JUROR NO. 46: Just based on percentages.

MR. CLOWARD: Okay. So we're already kind of categorized, we're kind of in that area; is that fair?

PROSPECTIVE JUROR NO. 46: I guess.

MR. CLOWARD: Being brutally honest, in your heart of hearts.

PROSPECTIVE JUROR NO. 46: Yeah.

MR. CLOWARD: Okay. Can I ask a question. Based on that feeling, is it going to be a little harder for me and my client -- in this particular case versus maybe if this was not a personally injury case at all, if this was like a water law dispute, is my client, the fact that we're here for money damages for pain and suffering and for medical bills, is it going to be a little bit harder for him in this particular case?

PROSPECTIVE JUROR NO. 46: I don't -- I wouldn't say it would be harder, no.

MR. CLOWARD: Do you think that your views on those issues are going to make it so that you're a little more skeptical that --

PROSPECTIVE JUROR NO. 46: I personally would call myself a skeptic just in general.

MR. CLOWARD: Okay.

PROSPECTIVE JUROR NO. 46: You know, I have to be

shown or, you know, things have to be proven to me. You know, you can hear somebody tell a ghost story or something like that, I'm just not going to believe until I see it for myself, like that.

MR. CLOWARD: Okay. If you were a plaintiff, and you were injured, and you had medical bills, would you want someone with your frame of mind sitting on your jury, being the skeptical?

PROSPECTIVE JUROR NO. 46: Well, for me, I don't -- I don't have a problem with the skepticism if -- as long as they can keep an open mind. You know, if I -- I wouldn't bring the case forward if I didn't think I had a legitimate case, me personally. So that being said, if I were to do that, I would hope I would be able to convince them that my claims were legitimate.

MR. CLOWARD: Would you require maybe more proof from our side? Let's say that there's, you know, an issue that's contested, would you require, you know, a lot more proof on our side because we've got to prove it versus their side?

PROSPECTIVE JUROR NO. 46: Without --

THE COURT: Mr. Cloward, could counsel approach for a second?

MR. CLOWARD: Yeah.

[Bench conference begins at 1:48 p.m.]

THE COURT: I'm sure you didn't intend to do this, but it's totally incorrect to say that you have the burden of proof and you have no burden at all, so you absolutely --

MR. CLOWARD: I said --

THE COURT: -- have to put up forward all of the evidence.

MR. CLOWARD: I said "a lot more", though. It doesn't require a lot more proof.

THE COURT: You have to put on a lot more forward than they do because they don't have to put forward anything, Mr. Cloward. They have no burden.

MR. CLOWARD: Preponderance of evidence requires just a little more.

THE COURT: I know, but that's not the question you asked. That's what I said. I don't think you intended to say it that way, but what you said was do they have to -- do we have to put more forward than them. You absolutely have to put more forward than them. They don't have to put forward anything. Do you understand what I'm saying?

MR. CLOWARD: I understand what you're saying, but I respectfully disagree that that's what my question meant because I asked --

MR. RANDS: I think she said --

THE COURT: That's what I said.

MR. RANDS: Yeah.

THE COURT: I am sure you didn't mean it to come out that way, but the question that you asked was, "Do we have to put more evidence forward than the Defense?" You do have to put more evidence forward than the Defense. I think what you are trying to ask is if he would require you to do more than prove --

MR. CLOWARD: [Indiscernible.]

THE COURT: -- by a preponderance of the evidence --

MR. CLOWARD: The burden of proof.

THE COURT: -- in your case. It's not compared to the Defense because they don't have to put forward any evidence at all.

MR. CLOWARD: I understand what you're saying. I just don't -- in my mind, I'm going over the question that I asked. I'm not seeing how I ran afoul because --

THE COURT: You said, "Do we have to present more evidence than the Defense," than them.

MR. CLOWARD: Yeah, but I gave him the example. I said let's say that there was one issue that they put forward some evidence and we put forward some evidence. Would we have --

THE COURT: They don't have to put forward any evidence, Mr. Cloward, ever. They can just sit there. They don't have to put any evidence.

MR. CLOWARD: I understand that, but if there's a context, you put some evidence on and other evidence. And I'm trying to find out are you going to require us to prove a lot more.

THE COURT: But not than them, a lot more than your burden that the law places on you, right? It's not compared to the Defense because they don't have to put on any evidence at all.

MR. CLOWARD: But --

THE COURT: If you don't prove your case --

MR. CLOWARD: It is compared to them because that's what the scales are. That's what they're -- the jury instruction preponderance of --

THE COURT: You're weighing the scale against yourself.

MR. CLOWARD: No, it's not, Judge.

THE COURT: They don't have to put on anything.

MR. CLOWARD: I understand that. There's a difference between the burden of proof or who has the --

MR. RANDS: The burden of persuasion.

MR. CLOWARD: -- the burden of persuasion versus the burden of proof. They're two different things. And when there are competing evidentiary issues, they do weigh theirs versus mine. They don't weigh -- they don't put what I didn't put on one versus what I did put on the other. They weigh what he says, they weigh what I say, and whoever --

THE COURT: Well, what if he doesn't say anything?

MR. CLOWARD: Then that's for them to consider. That's for them to consider. Usually if they don't put anything, then it's a directed verdict.

THE COURT: No, because if they don't think that you met your burden, they don't have to put on --

MR. RANDS: The burden of proof, they don't have to.

THE COURT: -- any evidence at all, Mr. Cloward.

MR. RANDS: And I've done that before.

MR. CLOWARD: Yeah, I mean --

THE COURT: I mean it's not as opposed to the Defense. It's did you meet your burden of proof.

MR. RANDS: By a preponderance of the evidence.

MR. CLOWARD: Well, I mean I can try and restate it, but --

THE COURT: You are only required to prove your case by a

preponderance of the evidence. I think what you're asking is, is he going to hold you to a higher standard than that, not as opposed to the Defense but just as opposed to the legal standard.

MR. CLOWARD: I'll try and rephrase.

THE COURT: Okay.

MR. CLOWARD: I didn't think -- I'm sorry. I didn't mean to --

[Bench conference ends at 1:52 p.m.]

MR. CLOWARD: So the Plaintiff has a certain burden to prove the evidence. That's a different burden than, say, in a criminal case. Criminal case, it's proof beyond a reasonable doubt. And in cases like these, it's preponderance of evidence. And so what I'm asking from you is, is let's say that we meet that burden and that burden, the judge will you at the end, it's just more likely than not. It's just you put everything on the scales and decide it tilts. And I guess the question I'm asking is because we're asking for a lot of money, are you going to require that we prove more than what the law requires.

PROSPECTIVE JUROR NUMBER 46: No. The money has nothing to do with whether -- they aren't related. They don't correlate necessarily. So you could be asking for $5. That doesn't mean you have to prove it any less. The same burden of proof, you know, the same standard would apply.

MR. CLOWARD: Okay. Are we already starting off maybe with something --

PROSPECTIVE JUROR NUMBER 46: I think you asked that already, but I'll say again no.

MR. CLOWARD: Okay. Is there anything else about the way that you see things that should be discussed?

PROSPECTIVE JUROR NUMBER 46: No.

MR. CLOWARD: Okay. Thank you.

THE COURT: Mr. Rands?

MR. RANDS: Good afternoon, Mr. Bledsoe. You said you're a pharmacist in a grocery store. What store is that?

PROSPECTIVE JUROR NUMBER 46: Smith's.

MR. RANDS: Smith's. Which one?

PROSPECTIVE JUROR NUMBER 46: 2540 South Maryland Park.

MR. RANDS: Okay. And you said your wife is a retail sales manager?

PROSPECTIVE JUROR NUMBER 46: Right.

MR. RANDS: Where does she work?

PROSPECTIVE JUROR NUMBER 46: Lululemon Athletica.

MR. RANDS: Okay. You said you had an uncle that passed away or died in a car accident. That was about 30 years ago, you said. Would that have any effect on your decision in this case if you were asked to be a juror?

PROSPECTIVE JUROR NUMBER 46: No.

MR. RANDS: And I also want to talk to you about cherry pie. I love cherry pie. Sorry. I'm in favor of cherry pie, by the way, too. So if you're a cherry pie fan. You said you've also been involved in a minor fender bender or two? Anything about that that would affect your decision in

this case?

PROSPECTIVE JUROR NUMBER 46: No.

MR. RANDS: Now you talked a little bit with counsel about burdens and other things. The judge will instruct you on all of that. I'm not going to get into that right now. But, as a jury, one of your duties will be to listen to the evidence, evaluate the evidence on that case and not any other case that you're aware of or [indiscernible] and make a decision based on the evidence presented in this case. Do you think you could do that?

PROSPECTIVE JUROR NUMBER 46: Sure.

MR. RANDS: And there will be argument at the end of the case where they'll be able to argue their case and we can argue our position on the case and then you can make a decision based on what you've heard though. One thing the judge will tell you is nothing the attorneys say is evidence. The evidence will come in through the exhibits and through the witnesses.

You said also, I believe early, you know, it seems like a long time ago, yesterday morning that you know of some of the doctors in the case.

PROSPECTIVE JUROR NUMBER 46: Correct.

MR. RANDS: Do you know enough about those doctors personally?

PROSPECTIVE JUROR NUMBER 46: No.

MR. RANDS: Do you know of any -- you think so, you might?

PROSPECTIVE JUROR NUMBER 46: I just fill prescriptions and seen their name, some of the names on prescriptions before, and that's

pretty much it. I don't have any personal experience with them or opinions about them.

MR. RANDS: Okay. So you wouldn't give one of them any greater weight just because you filled a lot of prescriptions for one doctor versus another?

PROSPECTIVE JUROR NUMBER 46: Right.

MR. RANDS: Okay. And I think in answer to one of the question of counsel, you said that, you know, you would keep an open mind, evaluate the evidence. Is that true?

PROSPECTIVE JUROR NUMBER 46: Correct.

MR. RANDS: Then make a decision based on what evidence comes in and what you feel like as a juror using your common sense --

PROSPECTIVE JUROR NUMBER 46: Yes.

MR. RANDS: -- should be done? And you can do that?

PROSPECTIVE JUROR NUMBER 46: Yeah.

MR. RANDS: Nothing further, Your Honor.

THE COURT: Counsel, approach, please.

MR. CLOWARD: Did you say approach?

THE COURT: Yep.

[Bench conference begins at 1:58 p.m.]

THE COURT: [Indiscernible.]

MR. CLOWARD: Yes.

THE COURT: All right. I'm going to grant the cause to you with respect to Mr. Turner but I'll deny it with respect to Mr. Bledsoe. We'll make a record for it later.

MR. CLOWARD: Okay.

THE COURT: Okay.

MR. RANDS: Thank you. I'll argue about it later.

THE COURT: We can put it on the record, but I have a good idea what you're both going to say.

MR. CLOWARD: We can put it on after if you want.

THE COURT: Actually, come here.

MR. CLOWARD: Doug?

THE COURT: You know what? Go ahead and tell me what you're going to say because [indiscernible] from the Supreme Court because I didn't take two minutes to get the record, so.

MR. CLOWARD: Oh, no. I meant to say I'm totally cool with doing it after.

THE COURT: Yeah. But the problem is we're not doing it after. If we make a more extended record, that's fine, but if I don't make a record now and there's a [indiscernible] --

MR. CLOWARD: Oh.

THE COURT: It's just --

MR. CLOWARD: Gotcha. Okay.

THE COURT: Haste makes waste, so let's just take a second.

MR. CLOWARD: Sure. I'll do it really quickly. Mr. Bledsoe indicated that he thinks that most lawsuits are frivolous, that his experience working at Smith's, he's seen people go over and lay down in water puddles and that he thinks, you know, that because of that, most lawsuits are frivolous.

He also indicated that he's got a personal issue with me which would, to me, suggest that it's more of an underlying the reason that I'm here rather than me personally, but he doesn't like what I stand for, which is to try and have a client be compensated for pain and suffering. And that's why he doesn't like me personally. I don't think I said anything that would be annoying yesterday. I was just simply talking about issues. So, to me, that would suggest more of a deeper philosophical disagreement with the principles that I'm advocating.

MR. GARDNER: I think it was a joke. I think he meant it as a joke. It was taken by everybody else as a joke about the pie. As far as the other stuff, he clearly said that he could listen to the evidence and make a decision based upon the evidence presented.

THE COURT: All right. So --

MR. GARDNER: And if this were a slip-and-fall case, maybe there would be something, but it's not. It's a [indiscernible] case.

THE COURT: I agree, so I'm going to deny the challenge for cause with both respect to -- did you want to make any record with respect to Mr. Turner?

MR. GARDNER: I agree with Mr. Cloward that it's --

THE COURT: Okay.

[Bench conference ends at 2:00 p.m.]

THE COURT: Okay. Mr. Turner, sir, I'm going to ask you to go back to Jury Services. Thank you so much for your time. Mr. Turner, sir.

THE CLERK: In seat number 8, Badge number 47, Arthur St. Laurent.

THE COURT: All right, sir. If you'll introduce yourself.

PROSPECTIVE JUROR NUMBER 47: Yes. I'm Arthur St. Laurent. I've lived in Clark County for two years. I moved here from California. I lived there for 20 years. And you might hear it in my speech patterns, but I'm from New York, Brooklyn, New York. So the more I get nervous, the more it comes out.

Let's see, I received a bachelor of science in psychology and a master in administrative justice. Let's see, I also attended a technical college when I was 18 years old and received a degree in electrical technology. I am employed, although I came here to retire. My wife says you're now around me 24/7. Maybe you should work. I laughed, too, but I am working -- and I am working in security at Mandalay Bay and on the convention side, convention security.

Yeah. What kind of work I do, right now I do security work, and I come from law enforcement. After I did my technical work for about ten years, I worked for Grumman Aerospace. And I always like to tell this story because it was so exciting. It was back in 1962, 1963. And Grumman Aerospace at the time won the contract from NASA to build the Lunar Module, and I was directly responsible for research work. I work under a physicist, and they were trying to determine what they wanted to build the LEM [phonetic], the Lunar Module, out of. And so it was an exciting time in my life, and I always like to share it. It was a lot of fun.

I am married. I have four children. All of them are adults right now, thank god. And I have five grandchildren and one on the way. So --

THE COURT: What do your four children do?

PROSPECTIVE JUROR NUMBER 47: I'm sorry.

THE COURT: What do your four children do, sir?

PROSPECTIVE JUROR NUMBER 47: Oh, what do my four children do, okay. One is in the technical field, computer science, and he lives on the East Coast in Virginia. My second son was a helicopter pilot for KGO and if you've ever gotten your traffic reports, he was the pilot there up in San Francisco. And my third and fourth -- third and fourth child are twins, a boy and a girl. And the boy is a manager at Whole Foods in California, and my daughter is a manager at a branch bank in California.

THE COURT: All right. Sir, go ahead and have a seat. Have you ever served as a juror before?

PROSPECTIVE JUROR NUMBER 47: No.

THE COURT: Have you ever been a party to a lawsuit or a witness in a lawsuit before?

PROSPECTIVE JUROR NUMBER 47: I have.

THE COURT: Can you tell me about that?

PROSPECTIVE JUROR NUMBER 47: Yes. It was while I was in law enforcement. I was asked to participate in a civil trial, and I was there as a witness to -- to an incident that happened at a business location, and the lawsuit was between the business and the insurance company.

THE COURT: So just related to your employment?

PROSPECTIVE JUROR NUMBER 47: Yes, it did.

THE COURT: Anything outside of your employment?

PROSPECTIVE JUROR NUMBER 47: No.

THE COURT: Have you or anyone close to you worked in the

legal field?

PROSPECTIVE JUROR NUMBER 47: No.

THE COURT: Have you or anyone close to you had medical training or worked in the medical field?

PROSPECTIVE JUROR NUMBER 47: No.

THE COURT: Have you or anyone close to you suffered a serious injury?

PROSPECTIVE JUROR NUMBER 47: Yes.

THE COURT: Can you tell me about that?

PROSPECTIVE JUROR NUMBER 47: There were two injuries to myself. One was when I was a technician, I got hit by 40,000 volts and survived and, although I think I lost my hair there. It hit me across the head, and it was serious. But I ended up going back to work. And then the second one was under employment, I was law enforcement at a crash scene, my vehicle was hit while I was in the vehicle or exiting the vehicle. And I had some back injury, but I was fine. And I got treatment, and then I went back to work.

THE COURT: Have you -- other than the accident you just described, have you or anyone close to you been in a car crash?

PROSPECTIVE JUROR NUMBER 47: No.

THE COURT: Can you wait to form an opinion until you've heard all of the evidence?

PROSPECTIVE JUROR NUMBER 47: Yes. Yeah.

THE COURT: Can you follow the instructions on the law that I give you even if you don't personally agree with them?

PROSPECTIVE JUROR NUMBER 47: Yes.

THE COURT: Do you set aside any sympathy you may have for either side and base your verdict solely on the evidence and the instructions on the law presented during the trial?

PROSPECTIVE JUROR NUMBER 47: Yes, I can do that.

THE COURT: Is there any reason you couldn't be completely fair and impartial if you were selected to serve as a juror in this case?

PROSPECTIVE JUROR NUMBER 47: No.

THE COURT: And if you were a party to this case, would you be comfortable having someone like yourself as a juror?

PROSPECTIVE JUROR NUMBER 47: Yes.

THE COURT: Mr. Cloward?

MR. CLOWARD: Thank you.

Mr. St. Laurent, it sounds like you've led an interesting life.

PROSPECTIVE JUROR NUMBER 47: Thank you. And I like cherry pie, so let's get it off the table.

MR. CLOWARD: Sorry, you don't want to sue me for pain and suffering --

PROSPECTIVE JUROR NUMBER 47: No, I would not, but I would like to maybe talk to you about cherry pie.

MR. CLOWARD: We can definitely talk about it.

PROSPECTIVE JUROR NUMBER 47: Okay.

MR. CLOWARD: I was going to say we go to the same barber, but I didn't -- I wasn't planning to do an electrocution. Tell me about that, 40,000 volts, geez Louise.

PROSPECTIVE JUROR ST. LAURENT: Yeah. It was during -- part of my job as a research technician was to run experiments -- actually what it was, what they were worried about, one of the things they were worried about was called micro meteor rights --

MR. CLOWARD: Uh-huh.

PROSPECTIVE JUROR NUMBER 47: -- and damage to the skins of the spacecraft. And at the time we were running experiments trying to duplicate what damage it would be to materials due to high velocity of small tungsten spheres. If you looked -- it felt like talcum powder, but if you looked under a microscope, you could see these small spheres that looked like ball bearings.

Well, needless to say, during the experience what we were doing was we were ionizing hydrogen gas to get the positive ions to impinge upon the micro -- the little spheres and then accelerate them. Well, during those experiments, I had to make an adjustment, and when I went in, the lens that focused the hydrogen beam was sitting at 40,000 volts. And at the time, I had lots of hair. And the spark came across, hit me across the head. And the thing that saved me is that behind me, because I had to bend into the apparatus, was a ground plate. So the spark actually crossed the top of my head, hit the ground plate, but threw me across the room.

MR. CLOWARD: That's wild. That is wild.

PROSPECTIVE JUROR NUMBER 47: And here I am.

MR. CLOWARD: Well, we're glad you're still with us.

PROSPECTIVE JUROR NUMBER 47: Yeah, so am I. And my children and grandchildren.

MR. CLOWARD: Yeah. That's a --

PROSPECTIVE JUROR NUMBER 47: Yes.

MR. CLOWARD: -- crazy story. A crazy story. Can I ask about some of your other work jobs, your other careers?

PROSPECTIVE JUROR NUMBER 47: Yeah. I was in law enforcement in New York. It was a county police department outside the City of New York. I was there for 22 years as a patrol officer, and also I worked -- my last four years I worked in our planning division, which reported to the commissioner of police.

MR. CLOWARD: Okay. now you're currently security with Mandalay Bay?

PROSPECTIVE JUROR NUMBER 47: Correct.

MR. CLOWARD: It's been a difficult time for Mandalay Bay. I'm sorry to -- do you have any experiences like Mr. Bledsoe where you have seen people, you know, laying down trying to, you know, say that they're hurt in water or anything like that? If you do security, do you do the guest reporting where you go and --

PROSPECTIVE JUROR NUMBER 47: Well, that comes across. People do have accidents and they get injured. And my job at the time is to help them hopefully prevent those types of things, but when someone does get hurt, my job was to -- is to help them contain the area, make the area safe, and get them the assistance that they need.

MR. CLOWARD: As part of that, do you do, you know, the investigation, take the photographs and different things?

PROSPECTIVE JUROR NUMBER 47: Yes. Actually, I have

done more of that in police work than I have in security. I just recently got the security job. But, yeah, I've taken reports and you look for the facts, you look for witnesses. And the things is to gather the information because somewhere down the road there's going to be people who are looking at this who were not at the incident --

MR. CLOWARD: Sure.

PROSPECTIVE JUROR NUMBER 47: -- much like this situation here.

MR. CLOWARD: Yeah. Very much like it. Has that experience caused you to see personal injury cases in a certain way? For instance, Mr. Bledsoe indicated he feels like most personal injury cases are probably frivolous. Do you have feelings one way or the other on that?

PROSPECTIVE JUROR NUMBER 47: No, I don't. I think it would be based on the facts and the evidence and the information. And I think I would view that as like in police work. Police work starts at a level of, you know, what would be a reasonable person think of the same -- you know, when we're investigating something, it's what would a reasonable person think. You know, why are you here at night at 3:00 in the morning in a back alley with [indiscernible] go in a window. So it's what would a reasonable person think. And so that's what I've always based my actions on.

MR. CLOWARD: Okay. Fair enough. Do you have any views about this case before we've started to talk about the facts? Do you have any thoughts about --

PROSPECTIVE JUROR NUMBER 47: Well, the only views is

things that have already been shared from you. We right now only have that information that you have shared, and it sounds like a serious thing that has to be considered. And I think all of us here are capable of doing that.

MR. CLOWARD: Sure. Is there anything -- any issue that has been discussed that you had strong feelings about that you felt like, you know what, I probably should talk about those feelings?

PROSPECTIVE JUROR NUMBER 47: Yeah. There's been one thing. I know you mentioned about a runaway jury.

MR. CLOWARD: Yeah.

PROSPECTIVE JUROR NUMBER 47: I understood -- I understand the comment. That might have to do with maybe a lot of sympathy involved. But the other thing I hear about types of civil lawsuits is also the term deep pockets, right?

MR. CLOWARD: Absolutely.

PROSPECTIVE JUROR NUMBER 47: And so that's -- when you said about runaway juries, I thought about that other comment about these types of civil lawsuits where the deep pockets. So it just gave me some thought as to, okay, there's pain and suffering, which I certainly could understand --

MR. CLOWARD: Uh-huh.

PROSPECTIVE JUROR NUMBER 47: -- and then the idea of deep pockets. And so that concept I was just giving it some thought that, you know, is it -- is there more pain and suffering because the pockets are deeper.

MR. CLOWARD: That's a great point.

PROSPECTIVE JUROR NUMBER 47: And so that -- I mean that's what I'm thinking of right there.

MR. CLOWARD: Yeah.

PROSPECTIVE JUROR NUMBER 47: And I don't -- I don't know if I've ever come to a conclusion about that.

MR. CLOWARD: Sure.

PROSPECTIVE JUROR NUMBER 47: I haven't come to any judgment on that, but I wonder about that.

MR. CLOWARD: That's a great point. That's a great point. Thank you for sharing that. There was some discussion yesterday about, I guess, the ability to pay a verdict. And, quite frankly, that's not something whether they're deep pockets, that's not something that will even be discussed. And I want to know does that bother you. Does it bother you that you won't even hear evidence of that, that it's not something you're even allowed to consider?

PROSPECTIVE JUROR NUMBER 47: No. Because I respect the process.

MR. CLOWARD: Okay.

PROSPECTIVE JUROR NUMBER 47: And there's going to be rules of evidence and there's going to rules of law, and I know that's what the judge is here for is to guide us through that and that's what I will respect.

MR. CLOWARD: Okay. Anything else about you that you care to share or that you think that we should know?

PROSPECTIVE JUROR NUMBER 47: No. I always felt myself to be a reasonable person, a happy person. And I enjoy life, and I hope to

maybe in this process contribute even if I'm selected or not.

MR. CLOWARD: Great. We certainly appreciate your participation. As the last kind of question that I've asked the others, you've shared some experiences and getting electrocuted in that way, that would be pretty darn serious. So I won't ask you any more questions about that. But as you look back on your life, were there times where maybe you didn't handle something the way that you had hoped that you would have when you're placed into that situation?

PROSPECTIVE JUROR NUMBER 47: Yes, and that's a personal matter. I don't mind sharing it. It had to do with a time in my life in our marriage where we were separated and divorced. And at that time, I wish I had made better decisions. The one happy thing is that we remarried after five years and now we continue in a good life. But at that moment, I think it would have -- not that I would want to go back, but I might have done things differently.

MR. CLOWARD: Okay. I can appreciate that. Thank you very much.

PROSPECTIVE JUROR NUMBER 47: Okay. Thank you.

THE COURT: Mr. Rands?

MR. RANDS: May we approach for just a minute, Your Honor?

THE COURT: Sure.

[Bench conference begins at 2:16 p.m.]

THE COURT: I need you to stop clicking [indiscernible] --

MR. RANDS: [Indiscernible].

THE COURT: -- for two hours. I --

MR. RANDS: I'll put the pen away and get a different one.

THE COURT: Thank you. I'll give you one that doesn't click if you need one.

MR. RANDS: I've got one that doesn't click. I'll just change pens right now.

THE COURT: Yeah.

MR. RANDS: This gentleman works Mandalay Bay security. I didn't know if he's going to get up here and I don't think it's an issue. But my partner Brett South does work for him. [indiscernible] has worked for Mandalay and does some [indiscernible] type stuff. I don't think he's ever met him. He said he had never met him, but --

MR. CLOWARD: I think if he just --

MR. RANDS: Can I just ask him if he's ever worked with an attorney named Brett South?

MR. CLOWARD: Yeah. But what I don't want to have happen is to say, hey, my partner --

MR. RANDS: No.

MR. CLOWARD: -- defends MGM.

THE COURT: He already said he didn't know --

MR. RANDS: Okay. Just leave it at that.

THE COURT: -- anybody here, so I [indiscernible].

MR. CLOWARD: Yeah.

MR. RANDS: It's such a big property. There's literally no

chance he's ever worked with him. Brett's had a case or two, but.

THE COURT: I can't -- and he's only been there for [indiscernible].

MR. RANDS: I just didn't want to get him to -- for that very reason.

THE COURT: I mean unless you have some concern on that.

MR. CLOWARD: No.

THE COURT: I don't either.

MR. RANDS: I'll just leave it alone then.

MR. CLOWARD: Yeah.

THE COURT: Yeah.

MR. CLOWARD: That's fine.

THE COURT: All right. Thank you.

MR. CLOWARD: Thanks.

[Bench conference ends at 2:18 p.m.]

MR. RANDS: Mr. St. Laurent?

PROSPECTIVE JUROR NUMBER 47: Yes.

MR. RANDS: You said you worked on the Lunar Module?

PROSPECTIVE JUROR NUMBER 47: Yes, I did.

MR. RANDS: You recognize that you're under oath to tell the truth?

PROSPECTIVE JUROR NUMBER 47: Yes.

MR. RANDS: Did we really land on the moon or was that something in Hollywood?

PROSPECTIVE JUROR NUMBER 47: I've been asked that

many times. I would have to say, yes, we did because there were a lot of moments, especially if you remember Apollo 13, which is after the moon landing and that was a very serious set of circumstances. And, yes, we did land on the moon.

MR. RANDS: I just figured I had somebody under oath. I might as well get the answer now.

PROSPECTIVE JUROR NUMBER 47: Yes.

MR. RANDS: You said that you were -- have your degrees, and one of them administrative justice, a master's?

PROSPECTIVE JUROR NUMBER 47: Yes.

MR. RANDS: And you said you worked for -- in law enforcement?

PROSPECTIVE JUROR NUMBER 47: Correct.

MR. RANDS: Was that in New York?

PROSPECTIVE JUROR NUMBER 47: Yes, it was a county police department outside the City of New York. It's called Nassau County Police Department. We serviced 1-1/2 million people.

MR. RANDS: Okay. How long did you work for them?

PROSPECTIVE JUROR NUMBER 47: Twenty-two years.

MR. RANDS: And was that where you worked immediately before retiring and moving to Las Vegas?

PROSPECTIVE JUROR NUMBER 47: No. I retired in 1992, and our family moved to California from New York. We had -- my brother and sister and parents lived in California, so we moved. And I worked in -- for a community college, Monterey Peninsula College in Monterey,

California, and I was the director of security.

MR. RANDS: For the community college?

PROSPECTIVE JUROR NUMBER 47: Correct.

MR. RANDS: And then you came from California to Vegas?

PROSPECTIVE JUROR NUMBER 47: That's correct, two years ago.

MR. RANDS: Okay. Counsel talked a little bit about your injury. I think he talked about the sexy injury with the electrical. You also said you had a back injury at work?

PROSPECTIVE JUROR NUMBER 47: That's correct.

MR. RANDS: Was that when you were working for the police department?

PROSPECTIVE JUROR ST. LAURENT: That's correct.

MR. RANDS: For the sheriff's department?

PROSPECTIVE JUROR NUMBER 47: Yes.

MR. RANDS: And anything about you having that injury, recovering that injury you think would affect your ability to be a fair juror in this case?

PROSPECTIVE JUROR NUMBER 47: No. I don't -- no, other than it was an auto accident, and it was a back injury. No. I understand the facts and the circumstances of the situation and I recovered well. And I was under workman's comp and so there was no personal lawsuits for myself. It was a dangerous situation. It was a snowstorm, and we were covering an accident. And the car coming from behind us was blind. We were on a hill, and we were on the bottom side of the hill. When the car came over, it had

no chance to stop.

MR. RANDS: One of those Eastern ice storms or snowstorms?

PROSPECTIVE JUROR NUMBER 47: It was. Yeah, it was in front of the black ice-type situation. Yeah.

MR. RANDS: You said in answer to one of counsel's questions that these are serious things that have to be considered, and you'll take your obligation if you're picked to be one of the jurors seriously?

PROSPECTIVE JUROR NUMBER 47: Yes.

MR. RANDS: But you believe that just because somebody was injured that they need to necessarily have a recovery? If you feel they don't prove their case?

PROSPECTIVE JUROR NUMBER 47: Oh, they don't prove their case, in other words, the pain and suffering; is that what you're looking at?

MR. RANDS: Yeah. So, for example --

PROSPECTIVE JUROR NUMBER 47: No. I would think so. I think that's a different level than maybe just getting compensation for the cost of the accident. And the pain and suffering situation, I can understand that it could exist. I mean I don't know what the extent of the injuries were and how it may affect their life moving forward. So I would have to -- you know, I would have to hear the evidence and the facts and make a decision based on that.

MR. RANDS: The question I was asking is some people have said, well, just because somebody's injured and brought a lawsuit that they're entitled to a judgment or a recovery. Do you believe that?

PROSPECTIVE JUROR NUMBER 47: No. Oh no.

MR. RANDS: They have to prove their case first, right?

PROSPECTIVE JUROR NUMBER 47: I would -- oh, I would think so, yes. Yes, very strongly. Yeah.

MR. RANDS: And just because they've asked you for millions of dollars, if you were a juror and you felt like maybe there was some liability but the damages weren't nearly that amount, could you award a lesser figure in good conscience?

PROSPECTIVE JUROR NUMBER 47: I think what I would base it on is what -- as a private person looking at this information is what appears to be reasonable --

MR. RANDS: Sure.

PROSPECTIVE JUROR NUMBER 47: -- and how that was proved and how the evidence brings you to that as a --

MR. RANDS: That it's reasonable, apply your common sense.

PROSPECTIVE JUROR NUMBER 47: Correct. And I think as a group, we can come to that conclusion.

MR. RANDS: Okay. As the height of you applying your common sense?

PROSPECTIVE JUROR NUMBER 47: Yes.

MR. RANDS: Okay. Thank you for your time.

THE COURT: All right. Counsel approach.

[Bench conference begins at 2:24 p.m.]

THE COURT: All right with that?

MR. CLOWARD: We're good.

counsel, and parties.

Ladies and gentlemen, I'm so sorry. I had something that I had to take care of during the break and it took a little longer than I anticipated. So I'm sorry that I made you wait, but it was entirely my fault.

All right. Mr. Cloward, are you ready?

MR. CLOWARD: Yes, Your Honor. Thank you.

OPENING STATEMENT BY THE PLAINTIFF

MR. CLOWARD: Good afternoon. This is the time that we finally get to talk about the case, talk about the facts [indiscernible]. Keep in mind what the attorneys say is not the evidence. This is just kind of a preview of what the evidence will show.

So drivers must stop at stop signs. Drivers must look both ways to make sure that it's safe before driving out into an intersection. These are pretty basic rules that we're -- that we learn in driver's ed.

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.

Tompkins goes east and west and actually dead-ends at Paradise. Up ahead is McLeod. And at McLeod, for traffic going west and east, there is a stop sign. There is not a stop sign for traffic going north and south on McLeod.

Mr. Lujan gets in his shuttlebus and it's time for him to get back to work. So he starts off. Bang. Collision takes place. He doesn't stop at the stop sign. He doesn't look left. He doesn't look right.

Aaron, who had been driving home from CSN that day, is driving along McLeod when all of the sudden, out of nowhere, the shuttlebus appears in front of him. He does what he thinks that he can do. He slams on the brakes and tries to swerve, but the collision takes place. He doesn't have time to react. He doesn't have time to brake fast enough because Mr. Lujan didn't stop at the stop sign.

Now, when the collision takes place, Aaron is gripping onto the steering wheel. He's gripping onto the steering wheel and he jams his wrists, tearing the cartilage in both wrists. His head hits forward, hits the A-pillar in the vehicle. His neck is jammed. His back is jammed. He actually -- the doctors find out he tears three discs in his back.

Mr. Lujan continues driving. He continues down the road. Aaron, in his mind, he's thinking, oh my gosh, is this a hit and run? Is he even going to stop? What's going on? I got this -- and he starts to feel the pain in his neck and in his wrists.

Eventually, about a hundred yards down, Mr. Lujan finally stops. Aaron, not knowing what to do -- he's never been in a accident before. At the time, he's 21 years old. Never had this happen before. He's trying to assess like is everything okay? Did I lose consciousness? Did I -- you know, what's going on?

Mr. Lujan comes over, 911's on the way. Very dismissive. Doesn't ask if he's okay. Basically tells Aaron that the paramedics are on the way.

Aaron's family, they don't live too far from there, so Aaron's mom and dad come to the scene. The ambulance comes to the scene and

they lay Aaron down into a -- the stretcher, do the full spine precaution where they basically tighten him in there very tight to make sure so when he goes to the hospital, make sure that he hasn't broken any bones, that there isn't paralysis, that he's got a concussion, those types of things. That starts this new life for Aaron into motion.

So as we get into the evidence, you're going to hear from the doctors. You're going to hear that Aaron was taken to the emergency room by ambulance. In the emergency room, they basically -- the injuries are -- he's in so much pain that they actually give him Morphine. They give him a shot of Morphine to calm things down.

They say, look, if these problems -- if this continues, what you need to do is you need to go follow up with the doctor. So at some point, he follows up with an emergency -- urgent care. He goes to the urgent care. They evaluate him. Gets referred to Dr. Coppel. Dr. Coppel is on the list of providers for the urgent care.

Goes to see Dr. Coppel. Dr. Coppel refers him to a chiropractor named Dr. Wiesner. And he begins what we call conservative therapy. Conservative therapy is physical therapy or chiropractic care.

And the doctors are going to come in. You're essentially going to hear from four main medical providers. You'll hear from Dr. Andrew Cash who went to the University of North Carolina, Dr. Alain -- and Dr. Cash is a -- what's called an orthopedic spine surgeon. Dr. Alain Coppel, he's a pain management doctor. He went to Johns Hopkins. He's got, you know, triple board certifications in pain and addiction medicine and anesthesiology. You're going to hear from Dr. Muir. Now, Dr. Muir is kind of unique. He

actually went to physical therapy school first. He went to Harvard -- or, excuse me, Stanford, started to practice physical therapy and then decided, you know what, I don't necessarily want to do that, so I'm going to go back. And he went to medical school and now he's an orthopedic spine surgeon. You're also going to hear from Dr. Kittusamy. She is a radiologist.

And those doctors are going to tell you about the medicine. And I want to take a moment and talk about the medicine. When an individual hurts their neck or back, because you -- it's not necessarily objective -- you can't tell just by looking at the skin a lot of times -- the doctors do tests. And they do orthopedic tests. They ask the patient, hey, where are you hurting, and they try to put the puzzle pieces together based on, number one, what they're being told; based on, number two, what are called orthopedic evaluations; and then also, number three, there are some radiographic tests that could be done that let the doctors know what's going on underneath, to look at the anatomy.

So, for instance, maybe you've heard of a CT scan. Maybe you've heard of an x-ray. Maybe you're heard of an MRI. Those are tests that can be performed to help the doctors know what's going on.

So Aaron, he has neck pain, he has mid-back, and he has low back pain. And he's going to see the doctors. They're trying to figure things out.

The problem with the spine is that it's very complex. You're going to -- before the end of this trial is over, you guys will all be experts in the field of spine medicine. Basically, the spine, when there is a very fast -- what we call rapid acceleration and deceleration event, the spine is taken

outside of its normal limits. And it's like if you were to go to the gym and put 300 pounds on the bench press without doing any warmup and try and bench press 300 pounds right off the bat. It's not going to go well. You've got to do warmup sets to get the body ready for that motion.

Well, in an accident, in a traumatic event, your body has zero time for that. It's subjected to a collision. The body parts are taken within the ranges of motion very quick and that's what injures the body.

So you'll hear evidence that there are two main types of spine injuries. One is a disc injury. And this is kind of like a half model. This is just one little segment. You have the vertebra. That's the bone. Then you have the disc and then the vertebra. On the back side, you have what's called a facet joint. Or a very technical term is a zygapophysial joint. I think I pronounced that correctly. And that's where this connects to this. So it's basically a joint that connects those two segments.

And you can have a disc, when it -- when there's a bulge like that that presses on the nerve root. Think of that like a hose. When you have a hose and you kink the hose, the water on the other end stops coming out.

Well, these facet joints also get irritated. And at every level of the spine there are what we call nerve roots. And the nerve roots are kind of like the hose. So the nerve roots come out and they actually come out of this little space right here. This is called the foraminal opening. Now, foramen, in Latin, that's a fancy way of saying hole. So the nerve roots come out the hole. And at every level on both sides, those nerve roots exit the spine. You can see them right here.

Well, what happens is if you have a disc derangement or a disc injury, you have what's called -- people have heard of a protrusion, herniation, extrusion, bulge. You have those injuries. And that's where the disc is actually pressing on that -- or on that nerve root.

What can happen, though, is, is that the inside of the disc can actually become disrupted. So it's like an egg. The inside of an egg becomes scrambled and that can cause problems.

Maybe people have heard of what's called an annular tear. So I want to show a diagram of an annular tear. Now, the disc -- it's going to be important. This is a big part of the case and the case presentation, the things that you'll hear. The disc is comprised of two main parts: the annulus, which is this, and then the nucleus, which is this. Think of it like an egg. Here's the yolk, the yellow part. Here's the white part. When you tear this portion, this stuff right here comes out and makes contact with little nerve fibers that go into the annulus. And that is painful.

Another way to think of that is like if you cut your hand. Okay? If you cut your hand and you get a pen and you push on it, that's going to hurt. That's like a compression. That's like the bulge. However, if you cut your hand and you get a lemon and you squeeze that lemon juice on that open cut, that hurts, too. Okay?

This material causes irritation when it comes in contact. The annulus keeps this nice and safe in the middle. And when it's nice and safe, it acts as a shock absorber. It's nice and contained there. However, when it comes into contact with these nerve fibers, it's like lemon. The lemon juice is getting out. Okay?

So what the doctors do is over time, the doctors, they try to figure out what is causing someone's pain. They look at the MRI. They ask the patient, where are you feeling pain. And they try to figure out, okay, is it this facet joint that's irritated that's causing the pain? Is this a disc injury that's causing pain? What is it that's going on?

Well, the way the doctors do that is kind of like what dentists do. When you have a tooth that's hurting you, you go into the dentist and you say, dentist -- they -- actually, they lay you down and you tell them -- you point to the tooth that hurts and then they come in with the air and they blow on that tooth. And you're like, ow, that hurts. So the dentist says, okay, says, you know, okay, we're going to numb this. They go back in. They inject a medication. And then five minutes later, they come back in, they get out the air, they blow on the tooth again. If you say ow again, then that lets them know there's more than one nerve involved. So then they do another injection. Come back in five minutes later. Blow the air again. And if at that point you're numb, you're not feeling it, then they do a root canal or they drill out the cavity. Okay?

You're -- you'll her evidence in this case that it is very similar, the process, with the spine. However, it takes a lot longer. And this is the reason why. The doctors have a suspicion of where the pain is going to be. But unlike the dentist where they can wheel the patient in and out of the surgery center -- so what happens is if the pain -- if the patient's pain does not go away after a certain period of time, then they realize, okay, it must be something deeper. This is not just soft tissue. This is not just a strain or a sprain. This is something more serious.

So they bring the patient to a facility. They lay them down on a table. And they actually insert a needle and they do what's called either a facet injection where they put the needle right next to the facet and squirt some medicine into that joint. It's a very controlled amount. They don't do a whole ton. They put it right where they want to.

And there's actually a radio fluoroscopy machine. It's like a big C-arm. Let's say this is where the patient is. The C-arm goes over the patient and it shoots live x-ray. So it's shooting live x-ray. The doctor is over there looking at the screen. He's watching his needle slowly be advanced. And before he places the medication, he puts a little bit of dye to let him know, okay, I'm right where I need to be or I need to put it in a little farther. And then he'll put the medication in there.

And then what happens is, the patient goes into the recovery room and the doctor will ask how did that make you feel, did it take away your pain. Because the medication that they put in there, it's actually numbing medication. It's Lidocaine. So it's just like when you go to the doctor and they put Marcaine in your mouth. Same kind of principle. If the patient has a good response, then they know that's what's causing the problem. Okay?

Now, if the patient doesn't have, say, a perfect response, like a hundred percent pain relief, then that lets the doctor know, okay, there's probably something else going on. So they usually schedule, you know, six weeks down the road, come back, and they do another set of injections. Say, for instance, this time they'll maybe do a nerve injection, what's called a transforaminal steroid epidural injection or a selective nerve root block. The

doctors will call it -- it's a TESI or a STRB?. Those are the quick ways. And they also do the same thing. They put the medication right next to the nerve, try to figure out if that's going to relieve the patient's pain. If that doesn't, then six or eight weeks later they come back.

Sometimes, patients can have multiple pain generators. They can have a disc causing problems and they can have the facet joint that's causing problems. So it's a lot of trial and error.

In Aaron's case, Dr. Muir -- back in 2006 [sic], Dr. Muir said, look, Aaron, I think that you have an annular tear. I think that you have this thing called internal disc disruption. That's where the egg is scrambled. But the problem is, is that the only way that you can diagnose that with some very limited exceptions is you have to do what's called a discogram, provocative discography study. And it's very painful. It's one of the few tests in medicine where the doctor actually tries to put the patient in pain. They try to reproduce the patient's pain.

So what they do is they lay the patient down on usually their stomach, sometimes on their side, and they insert a big, long needle. Whoops. Sorry about that. They insert a big, long needle actually right into the middle of the disc. And they pressurize the disc because they want to try and recreate the pain. And the patient is actually conscious because the patient has to be able to respond. He has to say, yeah, doctor, that's the usual type of pain that I have, or no, doctor, that doesn't hurt.

But the other thing that they do is this -- that they inject this with dye. So after the provocative part, the patient then goes and they have a CT scan the same day, right after, within a couple hours. So they go and

they do a CT scan. And you can actually see -- and there is a -- okay. There is actually a system to grade the discs. So you have the discs. There's actually six levels and it's called the Dallas Scale. Dallas was a doctor that basically developed this scale to rate how severe the fissure or the tear is. So you have grade zero, grade one, grade two, grade three, four, and five.

And when we show you this, there ain't no question. This is not subjective. This is as objective as it comes. Okay? Aaron has two grade four tears and one grade five tear. And you can actually see the tears.

The way that you see the tears is this. Imagine having a bike tire that you've got a razorblade and you've cut the side of the bike tire. Now, you get a pump and you sit and you pump it up. And you're wondering why isn't it getting bigger. A few more minutes. You're wondering what's going on. Until finally you realize, oh, there's a big tear in the side of this so it's not going to keep the air.

Well, it's the same principle with a disc. Okay? A disc -- the annulus, this acts as a block. It's a strong block. It does not let this material come out unless there's a tear. So when they inject the middle of this, if there's no tear, you will see a big bright signal -- it's like a ball -- right in the middle of the disc. However, if you have a tear, then it starts to sneak out. And the worse the tear, then the more it starts to sneak out. And by five, it's not only sneaking out of the tear, but it's leaking way out of the disc. Because that's the dye material.

So Dr. Muir back in 2016, he says, look, Aaron, you need to do this test because I need to figure out -- I think you have internal disc

disruption. And after we do this, then we'll do what's called a plasma disc decompression or a nucleoplasty. That's where at another time you come in and you insert a probe and you actually super heat the middle of the nucleus to remove some of that material in the hopes that you can kind of shrink that disc so that it's no longer painful.

Aaron, when this is recommended, he's 24 years old. He says to himself, Doctor, I don't know if I want to do that. Matter of fact, when he's deposed by Mr. Gardner in 2016, Mr. Gardner asked him about it and he says I'm just nervous, that's why I haven't done it.

Well, Aaron finally got to a point where he decided that the discography study along with a PDD were necessary and so he went and had those procedures very recently. And it provided him with about 90-percent pain relief. And the doctors for the first time have been able to see exactly this is what's going on, this is what's going on. Up until then, they had been doing these injections and the injections would provide some benefit, give him 40-percent relief, 50-percent relief, sometimes 60-percent relief, but not complete relief. And so, fortunately, they finally figured out what's going on with Aaron.

So you're going to hear from Dr. Coppel and Dr. Coppel will walk you through the process of how these injections are performed and so forth. Dr. Muir will also talk about that. Aaron also has a problem in his neck. The doctors feel like they have gotten that figured out. Dr. Muir will tell you, look, I'm fairly certain I know that this is going to be the problem, this is what the problem is, this is how we treat it.

So in this case, we had to look at a few things. We had to look

at, you know, look -- before we brought this case to court, we had to look at, you know, is there anything that Aaron did or that he could have done, number one, to avoid the collision. Was Aaron speeding, for instance? Was he on the cell phone? Was he texting? Was he doing something that he shouldn't have been doing?

You will hear zero evidence throughout the course of this trial that Aaron did anything wrong. You will hear zero evidence that the police came and said, you know what, you were going way too fast. You will hear zero evidence that he was on the phone. You will hear zero evidence that he was texting. He wasn't doing anything that contributed to the crash.

What you will hear is, is that Aaron tried his very best to avoid this crash, but he just wasn't able to because he wasn't given time. You won't hear that Aaron had a stop sign. Aaron had the right of way. This was not a four-way stop. This was a two-way stop. Aaron had the right of way.

But despite that, the Defense will try to claim that Aaron bears some responsibility. And matter of fact, they'll claim that a third party is responsible. They've been asserting that since the beginning of this case. There was actually another trial. They asserted that the third party was at fault. We still don't know who this third party is. So we'll ask the Defendant, who is this third party that was at fault?

There are some defenses also. You're going to hear from the doctors -- and I'm going to be brutally honest. We're paying the doctors thousands of dollars to be here. They're paying their doctors thousands of dollars to be here. All of the doctors in this case have active practices. What does that mean? They all treat patients. So when they come to court,

they have to take time away from their practice. They have to reschedule patients. And they have to be paid for that.

So the doctors in this case have different opinions. And you're going to hear basically two main medical opinions in the case. Number one, Dr. Sanders, their physician -- and it's worth noting Dr. Sanders will even admit on the stand that he's not a spine surgeon. Matter of fact, he's never performed a spine surgery as the lead surgeon ever. That's the doctor that they're going to bring to come and talk about spine issues.

Dr. Sanders will testify to two main things. He'll say, look, number one, Aaron had chiropractic treatment. He didn't have physical therapy treatment. And if he'd have had physical therapy treatment, all of his problems would have gone away. Okay? That's what he's going to claim.

So we looked at that. I wanted to know, is that actually accurate? Is there a benefit to chiropractic versus physical therapy? So we did some research. Dr. Muir is going to talk about his training and expertise as a physical therapist and he's going to talk about studies. There are actual journal articles in a multitude of journals -- *New England School of Medicine* [sic], *The Spine Journal* -- that have looked at the differences between physical therapy versus chiropractic. And there's not really a significant difference. There is a minimal difference to physical therapy, but it's not what we call clinically significant. So it's not really a big difference.

The second thing that Dr. Sanders will talk about, Dr. Sanders is going to say, look, ladies and gentlemen, his back pain didn't start for three weeks. It's not documented anywhere in the records for three weeks.

And so I talked to Aaron because it is true, the evidence will show, the back pain does not get documented until the second visit with Dr. Coppel.

So Aaron goes to the emergency room. They're focused on the head. They're focused on the neck. They're focused on the left wrist. He goes to the emergency care. They're not focused on the back. They're focused on other body parts. He goes to see Dr. Coppel. They're not focused on the low back. And then the second visit, Dr. Coppel finally notes low back pain.

And I asked Aaron about that. Aaron, what do you say about that? He says, look, I know that I hurt. Okay? If the doctors didn't put that in there, I can't explain it. I don't argue what's in the records. My whole body hurt. I know that my neck hurt and my wrist hurt a lot worse. And if the doctors didn't document it, then they didn't document it, but I know that my whole body hurt.

I also asked Dr. Muir. I said, Dr. Muir, tell me about this. You know? Here we have tears. We have tears to the annulus. What about that? Is it possible that that -- you know, that those things get worse or that the pain is not as bad at first? And Dr. Muir says, actually, that's true. There's an article, a 2013 article, that talks about the way that annular tears cause pain. It says what happens is think of it like a pencil. When you break a pencil as a little kid, sometimes you're able to put the pencil back together. Put a little piece of tape and you keep writing with it. Other times, the pencil doesn't quite go back together. But it is the regrowth of these fibers into those tears that causes the pain. So when these regrow into the nucleus, when they come in contact with the nucleus, that's what causes the

pain. And that healing process doesn't happen overnight.

So Dr. Muir will tell you that it's very reasonable. We see this all the time. He say number -- there are a couple of things. Number one, patients usually focus on the thing that's hurting the worst. Number two, I see this all the time with internal disc disruption. Dr. Cash also talks about that as well.

The third defense in the case, it's not a medical defense. It's not a medical defense. It's a defense that I highly doubt they'll even say out loud. They don't like who they think Aaron is. They think that Aaron gets into this crash and says to himself, you know what, this is a payday. He sits around and doesn't do anything and waits, waits for a verdict. That's what they think about Aaron.

But the truth of the matter is this. You'll hear that Aaron, despite having an extremely rough home life, having a father that is angry that goes bananas over the littlest things, that despite that, Aaron didn't crawl into a hole because of that. Matter of fact, when that was going on, when Aaron was being raised, he moved out at 16. He moved out of the house, lived with a friend to get away with it -- or to get away from it.

And matter of fact, that's where he met Alyssa, his girlfriend, who you'll also hear from. They met at church. Now, at the time, Aaron was -- he had a girlfriend and Alyssa had a boyfriend, so the timing didn't match up. But they did get together a couple of years later and you'll hear about that.

After he moves out from the friend, then he moves in with his grandma, stays there. He's at Smiths working. He starts off at Smiths

making $9 an hour. But because of his hard work and the way that he is, he gets promoted, and promoted again, and promoted again. And by the time he leaves Smiths several years later, he's making almost $15 an hour. He goes from 9 to 15 in a span of two or three years because he gets promoted.

At the time of this crash, Aaron's in school. He's at CSN. But the picture that they'll try to paint is that Aaron is just looking for a handout. You'll hear that after this crash -- or that right when the crash took place, Aaron was focusing on school, so he wasn't employed. But after the crash, he gets a job at LVAC. After the crash, he goes to work. That's the evidence.

He starts off at an entry level position. Again, because of hard work, he gets promoted. At the time he ends the relationship at LVAC, he's actually a nighttime manager at the ripe age of 22, 23 years old.

But here's where Aaron starts to have some problems. And Aaron is actually going to admit this. Aaron will tell you during the middle of this four years, he lost hope and he did give up for a very short period of time.

You see, Aaron's working at the gym and he's seeing all of these people come and go. And fitness was a huge thing for Aaron. He loved to be physically fit. He loved to lift weights. He loved to be really ripped and look great. Well, he's not able to do that. He's not able to do that and it starts to work on upstairs. He starts to worry because he starts to gain weight. He starts to think, she's going to leave me.

He starts to get depressed. He starts to self-medicate. He

starts to drink. It gets so bad that he's drinking a bottle a day. And it gets so bad that he loses his job at LVAC. Technically, he quit, but he'll tell you, look, it was my actions, I deserved to be fired, I would have been fired had I not quit. He winds up in the hospital in the psychiatric ward because he's drinking so much.

But thank God that Alyssa, she knows Aaron before. She knows the man that he can become. She sticks with him. After the event, the hospitalization, she says to him, listen, enough is enough. You got to stop this. You got to stop pushing those emotions down.

And so Aaron does what not a lot of people are able to do. He stops drinking to medicate himself. Aaron's working right now. He works at Subway. He's been working for the last year. He works fulltime. He works 40 hours a week. He's excited for this semester to get back into school. And that's where Aaron is right now.

A lot of this problem that Aaron had with the emotion came when after a surgery on his wrist he didn't have the greatest outcome. He had the surgery at the end of '15 and his wrist didn't get any better. And he was -- it was difficult for him to move his wrist, to use his wrist, and it started to wear on him. Fortunately, about a year after the surgery, he went to physical therapy, did the physical therapy, and now his wrist is a lot better. The tear to his right wrist, fortunately, there was an injection in that wrist and the pain went away. He had to have surgery on the left one.

In this case, you will not decide the wrist issues. That's already been determined by the Judge. The back and the neck are things that you will discuss and you will be decided -- or you will be requested to decide.

There's also this issue of pain and suffering. And I want to talk about that for a minute. Okay? Because at the end of this case, you'll find the medical bills are around $200,000. He'll have future medical that we'll talk about. The future medical are around $1 million.

The future medical are for things like this. Dr. Muir will talk to you about disc injuries and he will talk to you -- and Dr. Cash as well -- and they will explain that this plasma disc decompression, this nucleoplasty, it's a band aid. And that Aaron is 26 years old. That he's going to have to have future treatment. That this is not going to magically get better on its own. He has tears. He has grade five and grade four tears of his disc. This is not something that is going to just get better.

So Dr. Muir forecasts that based on his experience in treating other patients -- he's got 30-some-odd years of treating patients and so he looked -- based on his experience, based on the literature, based on what he knows of what can be expected for Aaron. And he'll talk about this surgery. And this is a nasty surgery. It's actually a two-part surgery.

The first thing they do is they go in through the stomach. They cut the individual open from the stomach. They move everything to the side. And then they actually dig this disc out. This material is called rongeur. Rongeur in French means rat tooth. So it's a tool that acts as a rat tooth. Basically grabs the disc material, pulls it out, grabs the disc material, pulls it out.

And then they get a spacer. And it's usually either bone from your hip or bone from a cadaver. They get a hammer, pound that in between the disc. Then they put some screws -- or a plate on the front.

Then they actually flip the patient over -- oops. I'm getting attacked here by these. So then they flip the patient over. And in the neck, usually you only have to do the front. But in the back, because it's a lot more supportive of the entire body, they have to do front and back. So then they go in and they cut this open and remove the facet joints like this, the same kind of thing. And then they put in basically these rods. And that holds everything into place. It's kind of like belts and suspenders. You want to hold everything into place so that it doesn't move around.

And that's what the future care part of the case is. It's for surgery. It's for additional injections, physical therapy, and so forth.

Now, I also want to talk about the pain and suffering and take a moment there. The pain and suffering is not about an amount of money that Aaron gets. That's not why we ask for pain and suffering. We ask for pain and suffering based on the things that are taken from him. Because five years from now, like we talked about, Aaron's not going to be able to come back into this courtroom and reassemble everybody and tell everybody, look, these are the problems that I'm having. He's not going to be able to come in 15 years from now and ask for your help.

This injury was thrust upon him by the Defendant running the stop sign. Aaron had no choice in this matter. This is his reality. And he has to deal with the consequences of the future treatment.

But he also has to deal with the consequence of five, six years from now, when he and Alyssa have a two or three year old toddler, the toddler comes up and says, daddy, hold you me. And he reaches down and is reminded. Or he has to make the decision of do I pick up my own child or

do I risk flaring up my back.

The potential embarrassment 15 years from now. He's going across the country, going for a -- you know, a seminar or something. And he's 6'5". He's a big guy. And he has to whisper to the flight attendant, can I -- could you help me with my carryon bag. And see the scorn from the other passengers looking at him like, dude, your 6'5", like what -- huh?

He has to deal with the potential of his six or seven-year-old daughter wanting him to teach her how to ride a bike. Can he hold the bike and run down the road? Or is it all of a sudden going to tie up his back?

Pain and suffering is not what somebody gets. It's what's taken from them. It's how their life is changed. How this injury was thrust upon him with no choice of his own. That's what pain and suffering is about. And those are the real losses. Because the medical bills, that just goes to pay a doctor. That goes to pay a doctor.

The last thing that you might hear is from Dr. Baker. All I can say is I hope that they call Dr. Baker. It'll get interesting. And I'm just going to leave you with that suspense. Thank you.

THE COURT: All right. Let's just take -- we're just going to take five minutes to let the -- to let Mr. Gardner get set up.

So during this break, you are admonished not to talk or converse among yourselves or with anyone else on any subject connected with this trial or read, watch, or listen to any report of or commentary on the trial, or any person connected with this trial by any medium of information, including without limitation newspapers, television, internet, and radio, or form or express any opinion on any subject connected with the trial until the

ATTEST: I do hereby certify that I have truly and correctly transcribed the audio-visual recording of the proceeding in the above-entitled case to the best of our ability.

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Dipti Patel
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Liesl Springer
Liesl Springer
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Erin Perkins
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Transcriber

Deborah Anderson
Deborah Anderson
Transcriber

Date: May 4,2018

EXHIBIT 12

EXHIBIT 12

RTRAN

DISTRICT COURT

CLARK COUNTY, NEVADA

AARON MORGAN, Plaintiff, vs. DAVID LUJAN Defendant.	CASE#: A-15-718679-C DEPT. VII

BEFORE THE HONORABLE **LINDA MARIE BELL**, DISTRICT COURT JUDGE

MONDAY, APRIL 9, 2018

RECORDER'S TRANSCRIPT OF HEARING
CIVIL JURY TRIAL

APPEARANCES:

For the Plaintiff: BRYAN BOYACK, ESQ.
BENJAMIN CLOWARD, ESQ.

For the Defendant: DOUGLAS GARDNER, ESQ.
DOUGLAS RANDS, ESQ.

RECORDED BY: RENEE VINCENT, COURT RECORDER

mention there was a subsequent motor vehicle accident and he said he was fine and I never pursued that.

THE COURT: All right. So, anything else, Mr. Cloward?

MR. CLOWARD: Okay. No. I just wanted to make sure that the doctor was aware of that.

THE COURT: Great. Sir, if you want to just have a seat right here we're going to bring the jury in and then we'll have you come up to the stand once they're in. Just wherever, wherever you like.

MR. RANDS: Mr. Gardner just texted me. He's in the elevator, so he'll be here.

THE COURT: Good. In 10 or 15 minutes he'll be here.

MR. RANDS: Ten or fifteen minutes, exactly, the elevators here.

[Pause]

MR. GARDNER: Your Honor, I'm sorry.

THE COURT: This one's for Mr. Gardner.

All right. Can you bring in the jury? All right. Mr. Rands, here's your jury instructions.

MR. RANDS: Thank you, Your Honor.

THE COURT: Take a look and see if -- will you guys look at that verdict form? I know it doesn't have the right caption. I know it's just the one we used the last trial. See if that looks sort of okay.

MR. RANDS: Yeah. That looks fine.

THE COURT: I don't know if it's right with what you're asking for for damages, but it's just what we used in the last trial which was similar

sort of.

THE MARSHAL: Please rise for the jury.

[Jury in at 9:13 a.m.]

THE COURT: We're back on the record in case number 8718679, Morgan v. Lujan. [indiscernible] Counsel and parties. Good morning, everyone. I hope you had a good weekend.

Mr. Gardner and Mr. Rands, if you'll please call your next witness.

MR. GARDNER: Yes, Dr. Sanders.

THE MARSHAL: Doctor, up here, please. If you would remain standing, raise your right hand, and face the clerk, please.

STEVEN SANDERS

[having been called as a witness and being first duly sworn testified as follows:]

THE COURT: Good morning, sir. Go ahead and have a seat, please. And if you'll please state your name and spell it for the record.

THE WITNESS: Steven Sanders, S-T-E-V-E-N, Sanders, S-A-N-D-E-R-S.

THE COURT: Thank you. Whenever you're ready, Mr. Gardner.

DIRECT EXAMINATION

BY MR. GARDNER:

Q Good morning, Doctor.

A Good morning.

Q Thank you for being here sincerely. Why don't you tell the jury

MR. GARDNER: Yes.

THE COURT: All right.

MR. GARDNER: It is.

THE COURT: So when we come back we'll be -- do you have any rebuttal witnesses, Mr. Cloward?

MR. CLOWARD: No.

THE COURT: Great. So when we come back you'll formally rest, we'll read jury instructions, and do closings.

MR. BOYACK: We have one thing.

THE COURT: All right.

MR. BOYACK: On the verdict form we just would like the past and future medical expenses and pain and suffering to be differentiated.

THE COURT: Yeah. Let me see.

MR. BOYACK: Just instead of the general.

THE COURT: That's fine. That's fine.

MR. BOYACK: Yeah. That's the only change.

THE COURT: That was just what we had laying around, so.

MR. BOYACK: Yeah.

THE COURT: So you want -- got it. Yeah. That looks great. I actually prefer that as well.

MR. BOYACK: Yeah. That was the only modification.

THE COURT: That's better if we have some sort of issue.

MR. BOYACK: Right.

THE COURT: All right. All right, folks.

[Recess at 12:31 p.m., recommencing at 1:31 p.m.]

THE COURT: Okay, folks. So you all have a copy or should be getting a copy of the jury instructions which I will read to you.

[The Court read the jury instructions to the jury.]

THE COURT: Mr. Cloward.

MR. CLOWARD: Thank you, Your Honor. May I have just one moment to set up here? It's been a long one. It's been a long one. This is my favorite part of the case because this means that the case is pretty much over. We get to go home and rest and relax a little bit.

When I was a little kid, I grew up in Utah, I remember one time one summer we had an old Astro van, the kind with the door that opened to the side, front bucket seats. And we were going on a family vacation. We were going down to Bryce Canyon. I was about 7 or 8 years old and I remember listening -- this is before ipods -- to an old Walkman. Remember the yellow Walkmans? I was listening to a tape of Don Williams, Good Old Boys like Me. Listening to that and we get down to the hotel and we were always as little kids excited about the souvies, souvenirs, things that you could get on vacation.

And I remember in that instance there was a shop next door to the hotel. I walked into the store and I had, you know, 20 bucks or however much a seven or eight year old kid has. And I was looking around and looking for the perfect souvenir. And I bumped the table and a figurine fell off the table onto the ground and broke. And immediately the store manager came over and he said, "Hey, you break it, you buy it." And I started to plead my case. "But I didn't mean to." My father walks over and kneels down and says, "Look, we need to have a discussion." We had a discussion

and I tried to plead my case. I said, "But, Dad, I didn't even want that. But, Dad, the figurine was too close to the side of the table." But, but, but all of these things.

My father just said, "You know what? Until you walked in there and bumped it, that figurine was just fine. You're the one, Ben, that walked in there and bumped it. You're the one that caused the damage. The store owner didn't do anything. It's not his fault. Why would it be fair for him to bear the burden of this?" So reluctantly I went and paid for the figuring. I told the shop owner I was sorry.

Well, in this case, they haven't even gotten to step one, which is to tell Aaron sorry. Still today on the -- what is it now, the sixth day of trial? I anticipate Counsel is going to stand up in five minutes, ten minutes, however long I take, and they're going to point the finger at Aaron. 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. Yet they're still here contesting liability. They're still here trying to blame Aaron. They're still here trying to blame some third party.

When I asked Ms. Janssen, "Who's this mysterious third party that you guys have been blaming for the last four years?" "I don't know, but Dr. Baker is going to come and tell you who that person is." It's just to throw whatever they can against the wall to see what sticks so that they don't have to be responsible.

You know, when we talked to Ms. Janssen and said, "Did you even know at the last trial in this case that your driver, when he took the stand

and talked to the other set of jurors that had to take time out of their life to come down and listen to this case, did you even know that your driver told those jurors that he didn't blame Aaron?" "No, I didn't know that." "Did you know that your driver said that Aaron did nothing wrong?" "No, I didn't know that."

Yet still today I would imagine in about 10, 15 minutes, they're going to get up and they're going to continue to point a finger at Aaron. They're going to say, "Well, you know what? He should have reacted differently. He should have -- you know, he had time to react. This was a big bus."

Well, let's look at the numbers. Let's look at the calculations in the case because it's important. Dr. Baker testified. Remember what he said? Average human reaction time, setting aside whether the person is startled, nervous, upset, anxious, emotional, under, you know, like worried. Set all that aside. The average perception reaction time for anybody who's placed in an emergency situation where they're required to brake, 1.5 to 2.5 seconds. And then in addition to that, he said and then once you add the startling, once you add the surprise, once you add the emotion of the event, then you add on anywhere from .2 up to a second. So now the 1.5 to 2.5 goes from 1.7 to potentially 3.5.

You might ask, well, why is this important? Why is Mr. Cloward talking about perception and reaction time? The average road width is about 11 feet. We know this took place in the third road or the third lane. So Mr. Lujan had to travel 3 lanes of travel, 33 feet. How long would it take to get 33 feet? It's basic math. 5,280 feet in a mile. Divide that by 60. If it's 1 mile per hour, divide that by 60 to find out how many feet you would go in

1 minute. Then divide that by another 60 to find out how many feet you would go in a second. That's 1.44 feet per second at 1 mile an hour.

So why is that important? Well, if you take 1.44, times that by 10 miles an hour, which is what Dr. Baker said the bus was going, is 14 feet per second. 1.44 times 15 seconds, 21 feet per second. Aaron had 1.5 or 1 to 2 seconds to react. So in the 1 to 2 seconds to react, the bus basically is traveling anywhere from 14 to 30 feet or 14 to 20 feet in 1 second. In 2 seconds, it's 30 feet to 40 feet. So they're going to get up and they're going to say, you know, Aaron, he had time. He should have this. He should have that.

Well, guess what? He didn't have time. And that's what, number one, the science shows. And that's, number two, what the two witnesses to this event have testified, that he didn't have time. He didn't have time to react. He's driving around the road trusting that Mr. Lujan is going to follow the rules of the road like everybody else. That this company transporting our elderly members of the community is going to follow the rules of the road. Aren't we lucky that there weren't other people on the bus? Aren't we lucky? But you know what? It's his fault apparently and that's what you're going to hear in about ten minutes.

So when you are asked to fill out the special verdict form there are a couple of things that you are going to fill out. This is what the form will look like. Basically, the first thing that you will fill out is was the Defendant negligent. Clear answer is yes. Mr. Lujan, in his testimony that was read from the stand, said that Aaron had the right of way, said that Aaron didn't do anything wrong. That's what the testimony is. Dr. Baker didn't say that it

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

Jury instruction number 28. You might be asking, well, why are they still here if the driver said it wasn't Aaron's fault. The police officer never came in and testified to that. Dr. Baker never testified to that. Why are they still here? Jury instruction number 28 is why. Jury instruction number 28 says the percentage of negligent attributable to the Plaintiff shall reduce the amount of such recovery by the proportionate amount of such negligence and the reduction will be made by the Court.

What does that mean? They want a discount because if you find that Aaron's 50 percent at fault, but you find that all of the treatment was related to this crash, it reduces the amount. They get a discount. That's why they're still pointing the finger at third parties that we've never heard anything about because they hope that it will get traction and that you will agree with their side of it, even though the driver and everyone else said that it was not Aaron's fault.

What else have we heard? What else have we heard? Well, the very first thing that you heard from Mr. Gardner was that this was a big conspiracy. That the doctors are in on it, the lawyers are in on it, Plaintiff's in on it. I believe his words were something along the lines of this is a great way for doctors to pad their pocketbook. You're going to hear evidence that

every single one of the doctors was referred by the Plaintiff's lawyer. Was that in the evidence? That wasn't in the evidence.

You also heard that at the time Mr. Gardner, the Defendant's lawyer, deposed Aaron they had all of the medical records. They had the medical records. They know what's in the medical records. It's not like it's a surprise that all of the sudden for the first time I'm pointing out, hey, guess what? You see this referral from the urgent care to Dr. Grabow? You see this referral from Dr. -- or from the urgent care to Dr. Coppel? That's been in the records for four years. And if it's been in the records for four years why are you coming into Court and trying to convince jurors, trying to precondition them against Aaron? Because that's the whole attack. That's the whole case. The whole case is, you know what? Aaron's not worthy of consideration. He's not worthy of a verdict. He's lazy. He hasn't had any great jobs with benefits and things like that. He works at Smith's. He works at Subway, so he's a bum. You shouldn't consider him as a human being. He lives in his basement.

In the opening statement you heard about the mythical basement. He doesn't even have a basement. Yet three or four times you were told Aaron lives in his basement with his girlfriend. Aaron lives in his basement with his girlfriend. I don't have anything against Aaron, but you're going to find out that he lives in his basement with his girlfriend. That's what you were told over and over. What does that have to do with anything other than wanting you to see Aaron in a certain light?

Just like Dr. Baker or Dr. Sanders. Dr. Sanders takes the stand and says, "Well, you know, there are these unusual exam findings. You know,

Aaron was doing this and Aaron was doing that and, you know, it was just unusual." Okay, Dr. Baker. I can see, yeah, you think those things were unusual. Why don't you allow people to videotape the examination so that the jurors can see exactly what happens in the examination room, right? If you don't have anything to hide why not allow somebody to videotape the examination? Well, you know, I don't want it to be twisted. How could it be twisted? If that's what happened in the examination room, then that's what happened in the examination room. But instead he comes here and he testifies that Aaron is acting unusually and doing these things and it's Aaron's word against his word. Aaron has no way to prove it. He has no way to prove it. Why not allow it to be videotaped?

You know, another thing that I thought a lot about is why not have a neuroradiologist come in here and have you guys and show you folks and explain that what is on this is not actually in Aaron's back? Why not? They hired Dr. Baker. They hired Dr. Sanders. Why not bring somebody in and explain these tears? Instead, they don't even show Dr. Baker this information and they pick somebody that doesn't even do spine surgeries. That's a whole another question.

Jury instruction number 17. This is a witness who has special knowledge, skill, experience, training, or education in a particular science, profession, et cetera. The second sentence, "In determining the weight to be given such opinion, you should consider the qualifications of the expert and the reasons given for the expert opinion. You are not bound by such opinion. Give it weight, if any, to which you deem entitled."

So what does that mean? That means that you get to consider, you

should consider why they bring somebody that doesn't do any spine surgeries, never has done one as the lead surgeon a day in his life, yet this is a spine injury case. That'd kind of be like if, you know, your car was broke down and you wanted a mechanic to come in and give some opinions, but instead of bringing the mechanic in, you bring in a plumber. A plumber can fix things too. A plumber can fix things, but why not bring the mechanic?

You know, at the first of this case in openings Mr. Gardner suggested that we were going to try and portray Aaron as some choir boy. We were brutally honest with Aaron and with you. And Aaron took the stand and said things about his past that are not comfortable. They are downright embarrassing. But we promised to be brutally honest with you just like you are brutally honest with us.

Another thing I thought about before I get to the damages, but I thought about, you know, what if this were a case about a building? What if the Defendant driver had run into the side of a building because he wasn't paying attention, he didn't look both ways, he ran a stop sign, ran into the side of a building. And after running into the side of the building the sprinklers go off, the electricity starts to blink. And so everybody comes down and they start to do the repairs. They get the sprinklers figured out. They get the electricity figured out. And then three weeks later the building owner says, "Hey, you know what? I just noticed this, but there's a crack in the foundation."

Do you think we would allow the shuttle bus company to come in here and say, "Well, you know what? Sorry. Sorry. You know, first time it's documented in the records is three weeks later. Sorry. It's really

coincidental. Yeah, I know that it's really coincidental that the bus driver hit the side of the building and now there's a crack in the foundation. Sorry that you didn't find it the first time you looked. Sorry about that."

When I asked Dr. Sanders, I said, hey, let's talk about internal disc disruption. Let's talk about annular tears. Do you remember how surprised he was? He says, "Oh, is there an annular tear?" They hadn't even told him that. They hadn't even told him about the pathology here. And then I asked him. I say, "Well, Doctor, what is more likely, that a 22-year old kid has annular tears caused from a traumatic event or that just spontaneously around the same time they just spontaneously show up and become symptomatic? Which one is more probable?" And he says, "Well, it's more probable that the trauma would cause that."

But they're going to try and argue. In a few minutes they're going to try and argue that, you know what? Dr. Sanders, he said that these didn't show up for a little while later and so they're not related. It's just a big coincidence. We know that it's a big coincidence, but, you know, trust our doctor. Trust him. The one doctor out of every single one that for some reason just couldn't remember how much he got paid in this case. Isn't that interesting? Every other doctor knew exactly to the penny, but for some reason Dr. Sanders, he just couldn't remember, couldn't remember. And when you discuss the jury instruction on experts, that's something that you get to consider.

So I want to talk a little bit now about the medical bills. We've gone over this ad nauseum. I know that everybody has been paying attention because there have been great questions that have been asked by each

one of you. And so I'm not going to go super deep and spend a bunch more time. I just want to point a couple of things out.

The medical bills in this case to date are $248,650. And that's for the injections. That's for the plasma disc decompression. That actually includes into that amount the surgery by Dr. Coppel and the Surgery Center for the wrists that's already been determined by the Court. You're instructed on that issue. There's also future care and I want to talk a little bit about future care.

You remember Dr. Cash and Dr. Muir both talked about future care. Dr. Muir talked about the physician care, ancillary medical care, diagnostic testing, medications, and then lumbar surgery. Lumbar surgery, 29 years old. The reason that we put that number is, as you recall, when Dr. Muir was on the stand and Dr. Cash, both of them testified to a reasonable degree of probability that this plasma disc decompression, it's like a big Band-Aid. It's going to buy him some time. He's 25, 26 now. It's going to buy him a couple of years. But both of them testified with this type of injury, with this and this, he's going to have to have the surgery. There's no question about it.

And the one thing that confused me was they criticized Aaron in the opening for not mitigating his damages. That means you're not doing enough to get better. But then in the next sentence they said, "But you know what? He didn't rush in and get this surgery." And they're criticizing him for not getting this surgery. Well, who wants to go in, rush in and have this? You know, who wants to rush in and have this? And if Aaron had rushed in and done this at age 22 after three or four months of therapy, you

might start to wonder, like what is going on here. But instead of rushing in and having this surgery, Aaron, he's tried to put up with it. He's tried to put up with it.

And finally it got to the point where he just said, "You know what? I can't do it anymore. I've got to go get it done." And it gave him relief fortunately. How long will that last? Up to three years. Dr. Muir and Dr. Cash both testified it will give him anywhere between one to three years. And then what's going to happen is he's going to have to have this surgery, the fusion surgery, where they basically go in and they put rods right here and plates, or excuse me, plate right here, rods right here, rods right here, a plate right here. They're going to fuse this level and they're going to fuse this level. And what is that going to do? That's going to put pressure on this disc that's already torn. That's going to put pressure on this. It's going to put pressure on this. So the two good discs that Aaron has, now you're going to start to put pressure on those.

And so that's when Dr. Cash was talking about this phenomenon called adjacent segment breakdown, adjacent segment disease. It's like if you have a spring and the spring takes pressure. And you pinch off two of the coils on the spring. Well, now what happens is the level above, the level below, that spring now has to absorb that pressure that once the whole thing was taking on was allowed to do.

And so Dr. Cash said, he said, "Look, in 17 years it's guaranteed, 17 years Aaron will have to have another lumbar surgery," so at age 46. And Dr. Cash, if you remember when he explained that, he said, "Look, we know from longitudinal studies that 3 percent each year, so the first year 3 percent

of people that have this surgery, the very first year, the very first year 3 percent of them are going to have that surgery. In the second year, 6 percent of them are going to have it. In the third year, 9 percent. In the fourth year, 12 percent, and so forth, up to 51 percent, which is 17 years." Dr. Cash and Dr. Muir said, look, but the fact is that Aaron, because he's got two levels, he's going to degenerate faster. He's going to degenerate faster. He's going to have to have revisions. He's going to have adjacent segment breakdown. And he's going to have additional surgeries.

So if you look, if he had one at 46, he had one at 63. He's not going to have one at 80 because the life expectancy doesn't go that far, so you back that number out. But when you think about this and the amounts, asks yourselves, because you get to consider the instruction says you may draw reasonable inferences from the evidence which you feel are justified in light of common experience. Okay. Does it make sense that if somebody fuses these two levels that it's going to break down and you're going to have additional problems? Do we all know that once you start cutting into the back it leads one surgery to the next surgery to the next surgery.

The other thing to consider is this. We talked a lot about this in voir dire. We talked about how comfortable people feel providing thinking about somebody else's future into the long future. And the reason that that's important is this is the only opportunity that Aaron has to prove his case. This is it. If things go horribly south, if a year from now he has this surgery and he ends up with complications, he ends up in the ICU, he has a stroke, and he's on a ventilator 24 hours a day, he doesn't get to come back and ask you folks for more money. That's not the way that it works. This is the

only opportunity. This is it. This is it.

So this compensation, when you think about it, this is to fix things that Aaron is going to have into the future that were thrust unnaturally upon him. He had no choice in this matter. His health was taken from him. We don't like to have things taken from us. We don't' like to have things taken from us. Well, guess what? His health was taken from him. So when you think about the money, when you think about his future, when you talk about his future, I want to point out a couple of things.

Thirty-eight years ago in 1980, the average gallon of gas was 88 cents, 88 cents a gallon. The average home price was $68,000. Twenty-one years ago, 1997, the average gallon of gas is $1.29. The average home price was $146,000. Four years ago, average gallon of gas was $3.70. It actually was higher than it is now. Today it's $2.57 on the national average. But the average home price was $287,000. The average home price has actually gone up. So you think about the money and into the future, well, you have to consider that as well.

The last thing that I want to talk about is this concept, pain and suffering. This is the hardest part of the case because this deals with the human loss. This stuff, that's money that will go to pay a medical provider to render services for Aaron and it is great. It is great. It is very great because it helps him. It helps him get the things that he needs done, but that goes to someone else. Pain and suffering is to address what was taken from Aaron.

And during voir dire somebody asked, well, why do we allow that. There was discussion, why do we allow that. When you look at the way that it used to be back in the Biblical times, and unfortunately, some societies,

they still do this. If you read the Bible, it talks about that if you dig a pit and your neighbor's ox falls into the pit, you have to pay them for that. That's dealing with property. The way that they dealt with personal injury though, if you hurt someone, it was eye for an eye justice. If you did something dumb and you poked out your neighbor's eye, guess what? You got yours poked out too. Eye for an eye, tooth for a tooth justice. That's the way that it used to be to encourage people, hey, be careful out there. Be careful out there. So that's on one extreme.

True justice, true justice would be if there was some mechanism in the law that we could unwind this whole thing and give what's been taken from Aaron back to him, that would be true justice. If we could give him his 22-year old back back to make this thing not happen again, but unfortunately we can't do that. It's impossible. So do we turn a blind eye? Do we not have any justice at all? Do we just say, "You know what? Ladies and gentlemen, you can do whatever on earth you want to whatever other human being you want and there will be no accountability." Do we want no justice? Is that what our society wants is no justice or turn a blind eye to justice? We don't want that either. That's over on this extreme.

So instead we say we'll compromise. It's not eye for an eye and it's not blind justice. It's not tooth for a tooth, or excuse me. I'm getting them mixed up. On one end, it's eye for an eye. On the other end, it's turning a blind eye or no justice at all. You compromise and you hold people accountable for what they do. When somebody hurts someone else they come into court, they say sorry, and they try to make it right. That's not what's happened in this case. So when you talk about pain and suffering,

the way that it used to be back in the day, back in the old school days is basically you take the amount of the medical bills, whatever other losses there were, and you just times it by three. That's the way it used to be done in the sixties, seventies, eighties. You just times it by three. But that's not very thoughtful in my view. You guys can do it however you want to do it. It's completely -- you guys are the boss when it comes to this. The Judge isn't going to tell you how to do it. There's no definite standard. That's what the jury instruction says. You guys get to do it however you want.

This is my proposal. This is my suggestion. Imagine you're on the computer and you see an ad. And in the ad it says, listen, we're willing to pay X amount per hour for a willing candidate. You've got to be 22-years old. You've got to be willing to have discs in your back torn. You've got to be willing to have all of the memories into the future affected. When you have a good memory and when you're in the moment of a very important time in your life, when you're having fun and you reach down and your torn back reminds you you've got a torn back, you've got to be willing to do that. You've got to be willing to have your health condition affect the way that you interact with the people in your life, with your wife, with your parents, with your children, with your grandparents, with your coworkers.

Your medical condition will affect the ability for you to sleep, how many hours of sleep you get. It will wake you up in the night. It will prevent you from going hiking. It will prevent you from running. It will prevent you from lifting weights. It will prevent you from doing the things that you love to do in life. And we're willing to pay you $5 an hour, $5 an hour. Who's going to sign up for that? What about $10 an hour? Think somebody would sign

up for that?

So when you go back and you thoughtfully calculate what would be reasonable, what a reasonable person, because the problem here is that Aaron didn't' sign up for this job. Aaron had no choice in this job. He was forced into it. His health was taken from him unnaturally. The consequence of the decision made by Mr. Lujan was thrust unnaturally upon Aaron.

So when you think about what is a reasonable amount for somebody and then you calculate the hours in the day, then you calculate his life expectancy of 52 years and you see, first off, figure out the amount, the hourly amount that everyone can agree upon. And then once you figure that out, once you say if somebody says, you know what? It'd have to be X amount. Otherwise nobody would ever agree to that. It'd have to be this high or it'd have to be this amount. Once you figure that out, then calculate the number of hours a day and the number of days a year and the number of years that Aaron has to live with this. That's what I propose is fair and just because that's the reasonable trade value for his condition right now.

Ladies and gentlemen, I'll have a moment at the end of this to talk to you again after the Defense goes, so this is not the last time, but the second time I talk to you is always much shorter. Thank you.

THE COURT: Mr. Rands.

MR. RANDS: Would it be possible to take a quick break before I start?

THE COURT: Sure. Folks, during this break, you're admonished not to talk or converse among yourselves or with anyone else on any subject connected with this trial, or to read, watch, or listen to any

during that trial and that happens. And I apologize for any part I might have played in that and you being out there.

But at the end of the day, we couldn't do this without you. And like I said, I'm not going to have another opportunity to come up, so this is the worst part of the trial for a defense lawyer because you're going to sit down. And he's going to get up and start ripping on you. And I can't believe he said this. I can't believe he did that. What an SOB. Why did he do that? He's a terrible person. I don't think I'm a terrible person. I just have a job to do.

And I appreciate your help and I appreciate your time. And thank you very much.

THE COURT: Thank you.

Rebuttal?

MR. CLOWARD: Thanks, Your Honor.

Mr. Rands, I'm not going to rip on you.

MR. RANDS: Oh, that' s not true. I don't believe that.

MR. CLOWARD: I am going to talk about the facts in the case and that's what's important.

That right there is worth $62,000 for the Defendant. That right there is worth $62,000. His future, his life; $62,000. They sit there and they criticize Aaron for not coming in here and acting like he's in more pain than he is, and coming in here and trying to make it look like he's in more pain than he is.

Think about that for a minute? What does that suggest to you about the kind of a person that Aaron is? Is he laying down? Is he

stretching out? Is he walking around? Does he got the neck brace on coming in here? No. He said I don't want to distract this process.

Putting aside everything else, this is the reality of Aaron Morgan's back. Okay? This is the reality. They can talk about well, he didn't do this procedure yet. Or is he really going to do this or is he really going to do that?

We don't come back in five years from now and get to say, hey, Defendant Aaron can't bear the pain anymore. He's no longer able to work. We can't do that. We don't get to do that. The law doesn't allow it.

So instead, the experts come in and they testify to what's called a reasonable degree of medical probability. And what did our experts base their testimony on? Well, you know what? I just treat people and I go to UFC matches and I this and I that. They say, no. The literature and the research on this topic says this.

When I asked Dr. Sanders, hey doctor, let's talk about the literature and the research of the Spine Journal, the official publication of the North American Spine Society, which he's not even a member of. Hey, doctor, let's talk about the New England Journal of Medicine. What does he do? Rather than ask -- answer a very simple question, very simple question of isn't it true, doctor, that the literature suggests that physical therapy may have a teeny bit of a benefit better but not significant? What does he do? He starts talking about something way off.

Well, you know, some journals they've had corruption and

they've had payments, and they've had this and that. No, no, no. Doctor, no, no, no, no. Bring it back and answer the very simple question. You knew for a week, the Defendant's knew for an entire week that I was going to ask him about these studies. They had an entire week. They knew the answer to the question. Why not do your own research and bring in your own research to suggest otherwise?

You knew from Dr. Muir when he testified on Wednesday that the statistics for adjacent segments say 3 percent per year, that that's what the literature and the research says. You've got an entire week. Where is it? Instead they want to suggest that it's speculation. Well, he maybe have this problem. He maybe have this problem. No. He maybe doesn't have this problem.

Unfortunately, the fact of the matter, the black and white, there is no question he has a grade 5 tear here, a grade 4 tear here, and a grade 5 tear here. Okay? No, no. Excuse me. Five, five, four. There is no question; none. That's what the facts are. They're not asking you to speculate.

And I'm not saying, hey, you know what? I can't point to anything that's causing his pain, but I'm hopeful that you'll give us a million dollars to take care of some theoretical speculative medical problem that he might have. That's not what I'm here doing. What I'm here doing saying you know what? He's got three tears in his back due to their negligence.

And I love the gambling analogy. I absolutely love it. I love it because guess what? Their driver gambled with his safety and he's

been paying the consequence ever since and he will be paying the consequence ever since. Ten years from now he'll be the one that's paying for it. So do I have a problem standing in front of you and asking for millions of dollars? Heck, no. And let me show you the numbers.

And the reason that I don't give numbers, I don't give numbers specifically because I want you to have a thoughtful discussion and a thoughtful debate about what somebody actually would have to pay to get somebody to sign up for this job that was thrust upon him. I want you to have a thoughtful discussion without suggesting a number.

Here's what the numbers are. I have no shame whatsoever. Five dollars an hour at 433 -- 438 waking hours. That's 2.1 million. Ten dollars an hour, 4.3 million. Fifty dollars an hour, 21 million.

And let me ask you a question. You think if that corporate representative were to come up to Aaron when he's 22 years old with a suitcase full of money and said, hey, Aaron, guess what? I'm going to change your life. I'm going to change your life. But in exchange I'm going to give you this suitcase. If the answer is no, then you know you haven't put enough money in that verdict form, because I don't think anybody in their right mind would do this.

Matter of fact, we know F-22 pilots, $50 million plane, what are they instructed to do if that plane's going down? Bail out. He didn't have a choice in this matter because of their gambling with his safety. So I'm sorry, but it's not fair. It's not fair that they made the choice and then they come in and try to do the yeah, but. Yeah, but this. Yeah, but. Yeah, but. Yeah, but.

Interestingly, when Mr. Rand stands up here, he says, well, maybe give him 25,000 for past meds, maybe. Well, guess what? Your doctor, when he took the stand, he acknowledged when he took the stand, he acknowledged that 100 percent of the neck and 100 percent of the thoracic complaints were related to this crash. That was a lot more than 25,000. That's what the evidence showed. But despite their own doctor telling you that, they still want a -- they want a discount. They want a discount.

Don't give them a discount. Hold them accountable. Thank you.

THE COURT: All right. The clerk is now going to swear the officers in.

You want to grab Sylvia?

THE MARSHAL: What's that?

THE COURT: Want to get Sylvia, so she can swear in the officer to take charge of the jury?

[Marshal, Sworn]

THE COURT: All right. Folks, if you will just go with the marshal? Oh, we need to identify our alternates, too.

THE MARSHAL: Yes.

THE COURT: Yeah. So our alternates are Juror -- in seat number 9, Mr. Birch, and then Mr. Martinez in seat number 10.

THE MARSHAL: Please rise for the jury.

Bring all your notepads and everything with you.

[The jury retired to deliberate at 3:38 p.m.]

ATTEST: I do hereby certify that I have truly and correctly transcribed the audio-visual recording of the proceeding in the above-entitled case to the best of our ability.

Crystal Thomas

Crystal Thomas
Transcriber

Deborah Anderson

Deborah Anderson
Transcriber

Date: May 4,2018

EXHIBIT 13

EXHIBIT 13

JI

DISTRICT COURT

CLARK COUNTY, NEVADA

AARON M. MORGAN Plaintiff, vs. DAVID E. LUJAN, HARVEST MANAGEMENT SUB LLC Defendants.	CASE NO.: A-15-718679-C DEPT. NO.: VII

JURY INSTRUCTIONS

INSTRUCTION NO. 1

LADIES AND GENTLEMEN OF THE JURY:

It is now my duty as judge to instruct you in the law that applies to this case. It is your duty as jurors to follow these instructions and to apply the following rules of law to the facts of the case, as you find them from the evidence.

You must not be concerned with the wisdom of any rule of law stated in these instructions. Regardless of any opinion you may have as to what the law ought to be, it would be a violation of your oath to base a verdict upon any other view of the law than that given in the instructions of the court.

INSTRUCTION NO. 2

If, in these instructions, any rule, direction or idea is repeated or stated in different ways, no emphasis thereon is intended by me and none may be inferred by you. For that reason, you are not to single out any certain sentence or any individual point or instruction and ignore the others, but you are to consider all the instructions as a whole and regard each in the light of all the others.

The order in which the instructions are given has no significance as to their relative importance.

INSTRUCTION NO. 3

If, during this trial, I have said or done anything which has suggested to you that I am inclined to favor the claims or position of any party, you will not be influenced by any such suggestion.

I have not expressed, nor intended to express, nor have I intended to intimate, any opinion as to which witnesses are or are not worthy of belief, what facts are or are not established, or what inferences should be drawn from the evidence. If any expression of mine has seemed to indicate an opinion relating to any of these matters, I instruct you to disregard it.

INSTRUCTION NO. 4

You must not be influenced in any degree by any personal feeling of sympathy for or prejudice against the plaintiff or defendant. Both sides are entitled to the same fair and impartial consideration.

INSTRUCTION NO. 5

One of the parties in this case is a corporation. A corporation is entitled to the same fair and unprejudiced treatment as an individual would be under like circumstances, and you should decide the case with the same impartiality you would use in deciding a case between individuals.

INSTRUCTION NO. 6

You may not communicate with anyone about the case on your cell phone, through e-mail, Blackberry, iPhone, text messaging, or on Twitter, Instagram, Snapchat, through any blog or website, through any Internet chat room or by way of any other social networking website, including Facebook, MySpace, LinkedIn, and YouTube, until your verdict is returned.

INSTRUCTION NO. 7

You must decide all questions of fact in this case from the evidence received in this trial and not from any other source. You must not make any independent investigation of the facts or the law or consider or discuss facts as to which there is no evidence. This means, for example, that you must not on your own visit the scene, conduct experiments, or consult reference works for additional information, including the Internet or other online services.

INSTRUCTION NO. 8

Although you are to consider only the evidence in the case in reaching a verdict, you must bring to the consideration of the evidence your everyday common sense and judgment as reasonable people. Thus, you are not limited solely to what you see and hear as the witnesses testify. You may draw reasonable inferences from the evidence which you feel are justified in the light of common experience, keeping in mind that such inferences should not be based on speculation or guess.

A verdict may never be influenced by sympathy, prejudice or public opinion. Your decision should be the product of sincere judgment and sound discretion in accordance with these rules of law.

INSTRUCTION NO. 9

The evidence which you are to consider in this case consists of the testimony of the witnesses, the exhibits, and any facts admitted or agreed to by counsel. Statements, arguments and opinions of counsel are not evidence in the case.

You must not speculate to be true any insinuations suggested by a question asked a witness. A question is not evidence and may be considered only as it supplies meaning to the answer.

You must disregard any evidence to which an objection was sustained by the court and any evidence ordered stricken by the court.

Anything you may have seen or heard outside the courtroom is not evidence and must also be disregarded.

INSTRUCTION NO. 10

There are two kinds of evidence: direct and circumstantial. Direct evidence is direct proof of a fact, such as testimony of an eyewitness. Circumstantial evidence is indirect evidence, that is, proof of a chain of facts from which you could find that another fact exists, even though it has not been proved directly. You are entitled to consider both kinds of evidence. The law permits you to give equal weight to both, but it is for you to decide how much weight to give to any evidence. It is for you to decide whether a fact has been proved by circumstantial evidence.

INSTRUCTION NO. 11

In determining whether any proposition has been proved, you should consider all of the evidence bearing on the question without regard to which party produced it.

INSTRUCTION NO. 12

If counsel for the parties have stipulated to any fact, you must accept the stipulation as evidence and regard that fact as proved.

INSTRUCTION NO. 13

Certain testimony has been read into evidence from a deposition. A deposition is testimony taken under oath before trial and preserved in writing. You are to consider that testimony as if it were given in court.

During the course of the trial you have heard reference made to the word "interrogatory." An interrogatory is a written question asked by one party to another, who must answer it under oath in writing. You are to consider interrogatories and as the answers thereto the same as if the questions had been asked and answered here in court.

INSTRUCTION NO. 14

The credibility or "believability" of a witness should be determined by the witness's manner upon the stand, the witness's relationship to the parties, the witness's fears, motives, interests or feelings, the witness's opportunity to have observed the matter to which the witness testified, the reasonableness of the witness's statements and the strength or weakness of the witness's recollections.

If you believe that a witness has lied about any material fact in the case, you may disregard the entire testimony of the witness or any portion of this testimony which is not proved by other evidence.

INSTRUCTION NO. 15

Discrepancies in a witness's testimony or between the witness's testimony and that of others, if there were any discrepancies; do not necessarily mean that the witness should be discredited. Failure of recollection is a common experience, and innocent misrecollection is not uncommon. It is a fact, also, that two persons witnessing an incident or transaction often will see or hear it differently. Whether a discrepancy pertains to a matter of importance or only to a trivial detail should be considered in weighing its significance.

INSTRUCTION NO. 16

An attorney has a right to interview a witness for the purpose of learning what testimony the witness will give. The fact that a witness has talked to an attorney and told the attorney what the witness would testify to does not, by itself, reflect adversely on the truth of the testimony of the witness.

INSTRUCTION NO. 17

A person who has special knowledge, skill, experience, training or education in a particular science, profession or occupation may give an opinion as an expert as to any matter in which the person is skilled. In determining the weight to be given such opinion, you should consider the qualifications and credibility of the expert and the reasons given for the expert's opinion. You are not bound by such opinion. Give it weight, if any, to which you deem it entitled.

INSTRUCTION NO. 18

A question has been asked in which an expert witness was told to assume that certain facts were true and to give an opinion based upon that assumption. This is called a hypothetical question. If any fact assumed in the question has not been established by the evidence you should determine the effect of that omission upon the value of the opinion.

INSTRUCTION NO. 19

An expert witness has testified about the expert's reliance upon books, treatises, articles or statements that have not been admitted into evidence. Reference by an expert witness to this material is allowed so that the expert witness may tell you what the expert relied upon to form the expert's opinion. You may not consider the material as evidence in this case. Rather, you may only consider the material to determine what weight, if any, you will give to the expert's opinion.

INSTRUCTION NO. 20

Whenever in these instructions I state that the burden, or the burden of proof, rests upon a certain party to prove a certain allegation made by that party, the meaning of such an instruction is this: That unless the truth of the allegation is proved by a preponderance of the evidence, you shall find the same not to be true.

The term "preponderance of the evidence" means such evidence as, when weighed with that opposed to it, has more convincing force, and from which it appears that the greater probability of truth lies therein.

INSTRUCTION NO. 21

The preponderance, or weight of evidence, is not necessarily with the greater number of witnesses.

The testimony of one witness worthy of belief is sufficient for the proof of any fact and would justify a verdict in accordance with such testimony, even if a number of witnesses have testified to the contrary. If, from the whole case, considering the credibility of witnesses, and after weighing the various factors of evidence, you believe that there is a balance of probability pointing to the accuracy and honesty of the one witness, you should accept that witness's testimony.

INSTRUCTION NO. 22

The plaintiff seeks to establish liability on a claim of negligence. I will now instruct on the law relating to this claim.

INSTRUCTION NO. 23

The plaintiff has the burden to prove:

1. That the defendant was negligent,

2. That the plaintiff sustained damage, and

3. That such negligence was a proximate cause of the damage sustained by the plaintiff.

The defendant has the burden of proving, as an affirmative defense:

1. That the plaintiff was negligent, and

2. That plaintiff's negligence was a proximate cause of any damage plaintiff may have sustained.

INSTRUCTION NO. 24

When I use the word "negligence" in these instructions, I mean the failure to do something which a reasonably careful person would do, or the doing of something which a reasonably careful person would not do, to avoid injury to themselves or others, under circumstances similar to those shown by the evidence.

It is the failure to use ordinary or reasonable care.

Ordinary or reasonable care is that care which persons of ordinary prudence would use in order to avoid injury to themselves or others under circumstances similar to those shown by the evidence.

The law does not say how a reasonably careful person would act under those circumstances. That is for you to decide.

You will note that the person whose conduct we set up as a standard is not the extraordinarily cautious individual, nor the exceptionally skillful one, but a person of reasonable and ordinary prudence.

INSTRUCTION NO. 25

A proximate cause of injury, damage, loss, or harm is a cause which, in natural and continuous sequence, produces the injury, damage, loss, or harm, and without which the injury, damage, loss, or harm, would not have occurred.

INSTRUCTION NO. 26

It has already been determined that Aaron Morgan injured his left and right wrists as a result of the crash on April 1, 2014 and that the treatment he received was reasonable and necessary. You are instructed that the billing amounts of $40,171 for that treatment was usual and customary for the Las Vegas community.

INSTRUCTION NO. 27

There have been two prior trials previously held in this matter. The first trial was set in April 2017 but needed to be rescheduled on the first day for an emergency. The second trial was in November 2017 and lasted for three days, but was not completed and no verdict was reached. You should not make any opinions or conclusions based on the fact that prior trials were held in this case.

INSTRUCTION NO. 28

The plaintiff may not recover damages if the plaintiff's comparative negligence is greater than the negligence of the defendant. However, if the plaintiff is negligent, the plaintiff may still recover a reduced sum so long as the plaintiff's comparative negligence was not greater than then the negligence of the defendant.

If you determine that the plaintiff is entitled to recover, you shall return by general verdict the total amount of damages sustained by the plaintiff without regard to the plaintiff's comparative negligence and you shall return a special verdict indicating the percentage of negligence attributable to each party.

The percentage of negligence attributable to the plaintiff shall reduce the amount of such recovery by the proportionate amount of such negligence and the reduction will be made by the court.

INSTRUCTION NO. 29

You are not to discuss or even consider whether or not the plaintiff was carrying insurance to cover medical bills, loss of earnings, or any other damages the plaintiff claims to have sustained.

You are not to discuss or even consider whether or not the defendants were carrying insurance that would reimburse the defendants for whatever sum of money the defendants may be called upon to pay to the plaintiff.

Whether or not either party was insured is immaterial and should make no difference in any verdict you may render in this case.

INSTRUCTION NO. 30

In determining the amount of losses, if any, suffered by the plaintiff as a proximate result of the accident in question, you will take into consideration the nature, extent and duration of the injuries you believe from the evidence plaintiff has sustained, and you will decide upon a sum of money sufficient to reasonably and fairly compensate plaintiff for the following items:

1. Past and future medical expenses; and
2. Past and future physical and mental pain, suffering, anguish, and disability.

INSTRUCTION NO. 31

No definite standard or method of calculation is prescribed by law by which to fix reasonable compensation for pain and suffering. Nor is the opinion of any witness required as to the amount of such reasonable compensation. Furthermore, the argument of counsel as to the amount of damages is not evidence of reasonable compensation. In making an award for pain and suffering, you shall exercise your authority with calm and reasonable judgment and the damages you fix shall be just and reasonable in light of the evidence.

INSTRUCTION NO. 32

If you find that plaintiff suffered injuries as result of the defendants' negligence, you must award reasonable and fair past suffering damages as a result of these injuries.

INSTRUCTION NO. 33

According to a table of mortality, Plaintiff Aaron Morgan, who is age 25, is expected to live 52 additional years. This figure is not conclusive. It is an average life expectancy of persons who have reached that age. This figure may be considered by you in connection with other evidence relating to probable life expectancy including evidence of occupation, health, habits and other activities. Bear in mind that many persons live longer and many die sooner than the average.

INSTRUCTION NO. 34

Whether any of these elements of damage have been proven by the evidence is for you to determine. Neither sympathy nor speculation is a proper basis for determining damages. However, absolute certainty as to the damages is not required. It is only required that a plaintiff prove each item of damage by a preponderance of the evidence.

INSTRUCTION NO. 35

The court has given you instructions embodying various rules of law to help guide you to a just and lawful verdict. Whether some of these instructions will apply will depend upon what you find to be the facts. The fact that I have instructed you on various subjects in this case including that of damages must not be taken as indicating an opinion of the court as to what you should find to be the facts or as to which party is entitled to your verdict.

INSTRUCTION NO. 36

If, during your deliberation, you should desire to be further informed on any point of law or hear again portions of the testimony, you must reduce your request to writing signed by the foreperson. The officer will then return you to court where the information sought will be given to you in the presence of the parties or their attorneys.

Playbacks of testimony are time-consuming and are not encouraged unless you deem it a necessity. Should you require a playback, you must carefully describe the testimony to be played back so that the court recorder can find the testimony. Remember, the court is not at liberty to supplement the evidence.

INSTRUCTION NO. 37

It is your duty as jurors to consult with one another and to deliberate with a view toward reaching an agreement, if you can do so without violence to your individual judgment. Each of you must decide the case for yourself, but should do so only after a consideration of the case with your fellow jurors, and you should not hesitate to change an opinion when convinced that it is erroneous. However, you should not be influenced to vote in any way on any questions submitted to you by the single fact that a majority of the jurors, or any of them, favor such a decision. In other words, you should not surrender your honest convictions concerning the effect or weight of evidence for the mere purpose of returning a verdict or solely because of the opinion of the other jurors. Whatever your verdict is, it must be the product of a careful and impartial consideration of all the evidence in the case under the rules of law as given you by the court.

INSTRUCTION NO. 38

When you retire to consider your verdict, you must select one of your number to act as foreperson, who will preside over your deliberation and will be your spokesperson here in court.

During your deliberation, you will have all the exhibits which were admitted into evidence, these written instructions and forms of verdict which have been prepared for your convenience.

In civil actions, three-fourths of the total number of jurors may find and return a verdict. This is a civil action. As soon as six or more of you have agreed upon the verdict, you must have the verdict signed and dated by your foreperson, and then return with them to this room.

INSTRUCTION NO. 39

Now you will listen to the arguments of counsel who will endeavor to aid you to reach a proper verdict by refreshing in your minds the evidence and by showing the application thereof to the law; but, whatever counsel may say, you will bear in mind that it is your duty to be governed in your deliberation by the evidence, as you understand it and remember it to be, and by the law as given you in these instructions, and return a verdict which, according to your reason and candid judgment, is just and proper.

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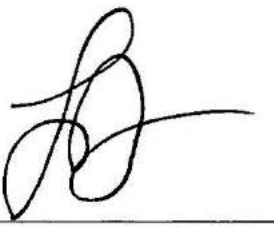

LINDA MARIE BELL
DISTRICT COURT JUDGE

EXHIBIT 14

EXHIBIT 14

DISTRICT COURT

CLARK COUNTY, NEVADA

CASE NO: A-15-718679-C

DEPT. NO: VII

AARON MORGAN,

Plaintiff,

vs.

DAVID LUJAN,

Defendant.

SPECIAL VERDICT

We, the jury in the above-entitled action, find the following special verdict on the questions submitted to us:

QUESTION NO. 1: Was Defendant negligent?

ANSWER: Yes ✓ No _____

If you answered no, stop here. Please sign and return this verdict.

If you answered yes, please answer question no. 2.

QUESTION NO.2: Was Plaintiff negligent?

ANSWER: Yes _____ No ✓

If you answered yes, please answer question no. 3.

If you answered no, please skip to question no. 4.

///

A-15-718679-C
SJV
Special Jury Verdict
4738215

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2

QUESTION NO. 3: What percentage of fault do you assign to each party?

Defendant: 100

Plaintiff: 0

Total: 100%

Please answer question 4 without regard to you answer to question 3.

QUESTION NO. 4: What amount do you assess as the total amount of Plaintiff's damages? (Please do not reduce damages based on your answer to question 3, if you answered question 3. The Court will perform this task.)

Past Medical Expenses	$ 208,480.00
Future Medical Expenses	$ 1,156,500.00
Past Pain and Suffering	$ 116,000.00
Future Pain and Suffering	$ 1,500,000.00
TOTAL	$ 2,980,980.00

DATED this 9th day of April, 2018.

Arthur J. St. Laurent

FOREPERSON

ARTHUR J. ST. LAURENT

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; DAVID E. LUJAN, Real Parties in Interest.	Case No. 81975 **PETITIONER'S APPENDIX, VOLUME 24** **(Nos. 3733–3782)**

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Attorneys for Petitioner, Aaron M. Morgan

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<tr><td>4</td><td>Notice of Appeal (filed 12/18/2018)</td><td>Vol. 24, 3770–3779</td></tr>
<tr><td>5</td><td>Supreme Court Register, Case No. 77753</td><td>Vol. 24, 3780–3782</td></tr>
<tr><td colspan="2">Respondent Harvest Management Sub LLC's Motion to Dismiss Appeal as Premature; Supreme Court Case No. 77753 (filed 01/23/2019)</td><td>Vol. 25, 3783–3791</td></tr>
<tr><td colspan="2">Exhibits Respondent Harvest Management Sub LLC's Motion to Dismiss Appeal as Premature</td><td></td></tr>
<tr><td>Exhibit</td><td>Document Description</td><td></td></tr>
<tr><td>1</td><td>Complaint (filed 05/20/2015)</td><td>Vol. 25, 3792–3798</td></tr>
</table>

DOCUMENT DESCRIPTION		LOCATION
Exhibit	**Document Description**	
1	Excerpted Transcript of November 6, 2018 hearing on Plaintiff's Motion for Entry of Judgment	Vol. 25, 3911–3915
Notice of Entry of Order Regarding Plaintiff's Counter-Motion to Transfer Case Back to Chief Judge Bell for Resolution of Post-Verdict Issue (filed 02/07/2019)		Vol. 25, 3916–3923
Supplement to Harvest Management Sub LLC's Motion for Entry of Judgment (filed 03/05/2019)		Vol. 25, 3924–3927
Exhibits Supplement to Harvest Management Sub LLC's Motion for Entry of Judgment		
Exhibit	**Document Description**	
1	Excerpted Transcript of April 4, 2018, Civil Jury Trial	Vol. 25, 3928–3934
2	Excerpted Transcript of April 6, 2018, Civil Jury Trial	Vol. 25, 3935–3951
3	Excerpted Transcript of April 9, 2018, Civil Jury Trial	Vol. 25, 3952–3959
Transcript of March 5, 2019 hearing on Defendant, Harvest Management Sub LLC's Motion for Entry of Judgment (filed 03/28/2019)		Vol. 26, 3960–3976
Supreme Court Order Denying Motion to Dismiss; Case No. 77753 (filed 03/07/2019)		Vol. 26, 3977
Minute Order of March 14, 2019 transferring case to Department 7, pursuant to EDCR 1.30(b)(15)		Vol. 26, 3978
Transcript of March 19, 2019, Status Check: Decision and All Defendant Harvest Management Motions (filed 02/12/2020)		Vol. 26, 3979–3996

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<tr><th colspan="2"><u>DOCUMENT DESCRIPTION</u></th><th><u>LOCATION</u></th></tr>
<tr><td colspan="2">Decision and Order (filed 04/05/2019)</td><td>Vol. 26, 3997–4002</td></tr>
<tr><td colspan="2">Harvest Management Sub LLC's Petition for Extraordinary Writ Relief; Supreme Court Case No. 78596 (filed 04/18/2019)</td><td>Vol. 26, 4003–4124</td></tr>
<tr><td colspan="2">Supreme Court Order Denying Petition for Writ of Mandamus; Case No. 78596 (filed 05/15/2019)</td><td>Vol. 26, 4125–4126</td></tr>
<tr><td colspan="2">Respondent Harvest Management Sub LLC's Renewed Motion to Dismiss Appeal as Premature; Supreme Court Case No. 77753 (filed 08/19/2019)</td><td>Vol. 27, 4127–4137</td></tr>
<tr><td colspan="2">Exhibits to Respondent Harvest Management Sub LLC's Renewed Motion to Dismiss Appeal as Premature; Supreme Court Case No. 77753</td><td></td></tr>
<tr><td>Exhibit</td><td>Document Description</td><td></td></tr>
<tr><td>1</td><td>Complaint (filed 05/20/2015)</td><td>Vol. 27, 4138–4142</td></tr>
<tr><td>2</td><td>Special Verdict (filed 04/09/2018)</td><td>Vol. 27, 4143–4145</td></tr>
<tr><td>3</td><td>Plaintiff's Motion for Entry of Judgment (filed 07/30/2018)</td><td>Vol. 27, 4146–4153</td></tr>
<tr><td>4</td><td>Defendant Harvest Management Sub LLC's Opposition to Plaintiff's Motion for Entry of Judgment (filed 08/16/2018)</td><td>Vol. 27, 4154–4180</td></tr>
<tr><td>5</td><td>Notice of Entry of Order on Plaintiff's Motion for Entry of Judgment (filed 11/28/2018)</td><td>Vol. 27, 4181–4186</td></tr>
<tr><td>6</td><td>Excerpted Transcript of November 6, 2018 hearing on Plaintiff's Motion for Entry of Judgment (filed 01/18/2019)</td><td>Vol. 27, 4187–4191</td></tr>
<tr><td>7</td><td>Notice of Entry of Judgment Upon Jury Verdict (filed 01/02/2019)</td><td>Vol. 27, 4192–4202</td></tr>
<tr><td>8</td><td>Notice of Appeal (filed 12/18/2018)</td><td>Vol. 27, 4203–4212</td></tr>
</table>

DOCUMENT DESCRIPTION		LOCATION
Exhibits to Respondent's Renewed Motion to Dismiss Appeal as Premature (cont.)		
9	Defendant Harvest Management Sub LLC's Motion for Entry of Judgment (filed 12/21/2018)	Vol. 27, 4213–4240
10	Decision and Order (filed 04/05/2019)	Vol. 27, 4241–4247
11	Supreme Court Order Denying Petition for Writ of Mandamus; Case No. 78596 (filed 05/15/2019)	Vol. 27, 4248–4250
12	Motion for Remand Pursuant to NRAP 12A; Supreme Court Case No. 77753	Vol. 27, 4251–4261
13	Respondent Harvest Management Sub LLC's Opposition to Motion for Remand Pursuant to NRAP 12A (filed 05/17/2019)	Vol. 27, 4262–4274
14	Supreme Court Order Denying Motion; Case No. 77753 (filed 07/31/2019)	Vol. 27, 4275–4276
Supreme Court Order Dismissing Appeal; Case No. 77753 (filed 09/17/2019)		Vol. 27, 4277–4278
Transcript of October 29, 2019 hearing on Defendant Harvest Management Sub LLC's Motion for Entry of Judgment (filed 02/19/2020)		Vol. 27, 4279–4283
Decision and Order (filed 01/03/2020)		Vol. 27, 4284–4294
Minute Order of January 14, 2020 hearing on setting trial date, status check and decision		Vol. 27, 4295
Transcript of January 14, 2020 of hearing on setting trial date, status check and decision (filed 02/12/2020)		Vol. 27, 4296–4301
District Court Docket, Case No. A-15-718679-C		Vol. 27, 4302–4309

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Attorneys for Plaintiff, Aaron Morgan

DISTRICT COURT

CLARK COUNTY, NEVADA

AARON M. MORGAN, individually,

Plaintiff,

vs.

DAVID E. LUJAN, individually; HARVEST MANAGEMENT SUB LLC; a Foreign Limited-Liability Company; DOES 1 through 20; ROE BUSINESS ENTITIES 1 through 20, inclusive jointly and severally,

Defendants.

Case No.: A-15-718679-C
Dept. No.: XI

NOTICE OF ENTRY OF JUDGMENT

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10001 Park Run Drive
Las Vegas, Nevada 89145
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MAC:15167-001 3612459_1

Please take notice that the Judgment Upon Jury Verdict was filed in the above-captioned matter on December 17, 2018. A copy of the Judgment Upon Jury Verdict is attached hereto as **Exhibit 1**.

Dated this 2nd day of January, 2019.

MARQUIS AURBACH COFFING

By /s/ Micah S. Echols
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CERTIFICATE OF SERVICE

I hereby certify that the foregoing **NOTICE OF ENTRY OF JUDGMENT** was submitted electronically for filing and/or service with the Eighth Judicial District Court on the 2nd day of January, 2019. Electronic service of the foregoing document shall be made in accordance with the E-Service List as follows:[1]

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/s/ Leah Dell
Leah Dell, an employee of
Marquis Aurbach Coffing

[1] Pursuant to EDCR 8.05(a), each party who submits an E-Filed document through the E-Filing System consents to electronic service in accordance with NRCP 5(b)(2)(D).

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Exhibit 1

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Attorneys for Plaintiff, Aaron M. Morgan

RICHARD HARRIS LAW FIRM

DISTRICT COURT

CLARK COUNTY, NEVADA

AARON M. MORGAN, individually, Plaintiff, vs. DAVID E. LUJAN, individually; HARVEST MANAGEMENT SUB LLC; a Foreign Limited-Liability Company; DOES 1 through 20; ROE BUSINESS ENTITIES 1 through 20, inclusive jointly and severally, Defendants.	CASE NO.: A-15-718679-C Dept. No.: XI **JUDGMENT UPON THE JURY VERDICT**

12-13-18P01:10 RCVD

JUDGMENT UPON THE JURY VERDICT

This action came on for trial before the Court and the jury, the Honorable Linda Marie Bell, District Court Judge, presiding,[1] and the issues having been duly tried and the jury having duly rendered its verdict.[2]

IT IS ORDERED AND ADJUDGED that PLAINTIFF, AARON M. MORGAN, have a recovery against DEFENDANT, DAVID E. LUJAN, for the following sums:

Past Medical Expenses	$208,480.00
Future Medical Expenses	+$1,156,500.00
Past Pain and Suffering	+$116,000.00
Future Pain and Suffering	+$1,500,000.00
Total Damages	**$2,980,980.00**

IT IS FURTHER ORDERED AND ADJUDGED that AARON M. MORGAN's past damages of $324,480 shall bear Pre-Judgment interest in accordance with *Lee v. Ball*, 121 Nev. 391, 116 P.3d 64 (2005) and NRS 17.130 at the rate of 5.00% per annum plus 2% from the date of service of the Summons and Complaint on May 28, 2015, through the entry of the Special Verdict on April 9, 2018:

PRE-JUDGMENT INTEREST ON PAST DAMAGES:

05/28/15 through 04/09/18 = **$65,402.72**

[(1,051 days) at (prime rate (5.00%) plus 2 percent = 7.00%) on $324,480 past damages]

[Pre-Judgment Interest is approximately $62.23 per day]

PLAINTIFF'S TOTAL JUDGMENT

Plaintiff's total judgment is as follows:

Total Damages:	**$2,980,980.00**
Prejudgment Interest:	**$65,402.72**
TOTAL JUDGMENT	**$3,046,382.72**

[1] This case was reassigned to the Honorable Elizabeth Gonzalez, District Court Judge, in July 2018.

[2] *See* Special Verdict filed on April 9, 2018, attached as **Exhibit 1**.

Now, THEREFORE, Judgment Upon the Jury Verdict in favor of the Plaintiff is as follows:

PLAINTIFF, AARON M. MORGAN, is hereby awarded **$3,046,382.72** against DEFENDANT, DAVID E. LUJAN, which shall bear post-judgment interest at the adjustable legal rate from the date of the entry of judgment until fully satisfied. Post-judgment interest at the current 7.00% rate accrues interest at the rate of $584.24 per day.

Dated this 13 day of Dec., 2018.

HONORABLE ELIZABETH GONZALEZ
DISTRICT COURT JUDGE
DEPARTMENT 11

Respectfully Submitted by:

Dated this 12th day of December, 2018.

MARQUIS AURBACH COFFING

By _____
Micah S. Echols, Esq.
Nevada Bar No. 8437
Tom W. Stewart, Esq.
Nevada Bar No. 14280
10001 Park Run Drive
Las Vegas, Nevada 89145
Attorneys for Plaintiff, Aaron M. Morgan

[CASE NO. A-15-718679-C—JUDGMENT UPON THE JURY VERDICT]

RICHARD HARRIS LAW FIRM

Exhibit 1

FILED IN OPEN COURT
STEVEN D. GRIERSON
CLERK OF THE COURT
APR - 9 2018
BY: C.R.M. BROWN, DEPUTY

DISTRICT COURT

CLARK COUNTY, NEVADA

CASE NO: A-15-718679-C

DEPT. NO: VII

AARON MORGAN,

Plaintiff,

vs.

DAVID LUJAN,

Defendant.

SPECIAL VERDICT

We, the jury in the above-entitled action, find the following special verdict on the questions submitted to us:

QUESTION NO. 1: Was Defendant negligent?

ANSWER: Yes ✓ No _____

If you answered no, stop here. Please sign and return this verdict.

If you answered yes, please answer question no. 2.

QUESTION NO.2: Was Plaintiff negligent?

ANSWER: Yes _____ No ✓

If you answered yes, please answer question no. 3.

If you answered no, please skip to question no. 4.

///

A-15-718679-C
SJV
Special Jury Verdict
4738215

2

QUESTION NO. 3: What percentage of fault do you assign to each party?

Defendant: 100

Plaintiff: 0

Total: 100%

Please answer question 4 without regard to you answer to question 3.

QUESTION NO. 4: What amount do you assess as the total amount of Plaintiff's damages? (Please do not reduce damages based on your answer to question 3, if you answered question 3. The Court will perform this task.)

Past Medical Expenses	$ 208,480.00
Future Medical Expenses	$ 1,156,500.00
Past Pain and Suffering	$ 116,000.00
Future Pain and Suffering	$ 1,500,000.00
TOTAL	$ 2,980,980.00

DATED this 9th day of April, 2018.

Arthur J. St. Laurent

FOREPERSON

ARTHUR J. ST. LAURENT

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DISTRICT COURT

CLARK COUNTY, NEVADA

AARON M. MORGAN, individually,

Plaintiff,

vs.

DAVID E. LUJAN, individually; HARVEST MANAGEMENT SUB LLC; a Foreign Limited-Liability Company; DOES 1 through 20; ROE BUSINESS ENTITIES 1 through 20, inclusive jointly and severally,

Defendants.

Case No.: A-15-718679-C
Dept. No.: XI

OPPOSITION TO DEFENDANT HARVEST MANAGEMENT SUB LLC'S MOTION FOR ENTRY OF JUDGMENT and COUNTER-MOTION TO TRANSFER CASE BACK TO CHIEF JUDGE BELL FOR RESOLUTION OF POST-VERDICT ISSUES

Plaintiff Aaron M. Morgan, by and through his attorneys of record, Micah S. Echols, Esq., and Kathleen A. Wilde, Esq., of the law firm of Marquis Aurbach Coffing, and Benjamin P. Cloward Esq., and Bryan A. Boyack, Esq. of the Richard Harris Law Firm, hereby files his Opposition to Defendant Harvest Management Sub LLC's Motion for Entry of Judgment and

Counter-Motion to Return Transfer Case Back to Chief Judge Bell for Resolution of Post-Verdict Issues.

This Opposition and Counter-Motion are made and based upon the attached Memorandum of Points and Authorities, all papers and pleadings on file herein, and any oral argument permitted by the Court at a hearing on the matter.

Dated this 15th day of January, 2019.

MARQUIS AURBACH COFFING

By: Kathleen Wilde

Micah S. Echols, Esq.
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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

For over four years, Plaintiff Aaron Morgan ("Morgan") litigated three negligence-based claims against the Defendants, David Lujan ("Lujan") **and** Harvest Management Sub LLC ("Harvest Management"). During this time period, all parties understood that Morgan's claims centered on Lujan's failure to act with reasonable care while driving bus in the course of his employment and Harvest Management's liability as Lujan's employer. Consistent with this understanding, a single law firm jointly represented both Defendants up to and throughout two separate jury trials. But, because Judge Bell made a single, easily explainable error by recycling a special verdict form, new counsel for Harvest Management now argues that the jury trial established liability only as to Lujan and that, as such, this Court should enter judgment in favor of Harvest Management as to Morgan's third cause of action for vicarious liability / respondeat superior.

In so arguing, Harvest Management expects this Court to ignore two serious procedural problems, namely, the fact that Morgan's December 18, 2018, Notice of Appeal divested this

Court of jurisdiction to enter orders which may affect the decisions which are subject to appellate review. Relatedly, because the Court already entered a final judgment in this case, Harvest Management's motion is also improper under *SFPP, L.P. v. Second Judicial Dist. Court*, 123 Nev. 608, 612, 173 P.3d 715, 717 (2007), because Harvest Management did not file a proper "motion sanctioned by the Nevada Rules of Civil Procedure."

These two reasons, of themselves, are grounds upon which to deny outright Harvest Management's Motion for Entry of Judgment. Yet, even if this Court considers the motion on the merits, Harvest Management's attempts to backdoor its way into a judgment that is inconsistent with the jury's verdict also must fail because Judge Bell is in a better position to address what happened during trial, this Court already rejected Harvest Management's arguments regarding NRCP 49, and there is no basis upon which to enter judgment in Harvest Management's favor. Thus, while this Court can resolve the Motion for Entry of Judgment in several different ways, the end result is the same: Harvest Management's motion must fail.

II. FACTS AND PROCEDURAL HISTORY

A. BRIEF STATEMENT OF FACTS.

On April 1, 2014, Morgan was driving northbound on McLeod Drive in the far right lane as he approached the intersection at Tompkins Avenue. At the same time, Lujan, who was driving a Montara Meadows shuttle bus during the course and scope of his employment, crossed McLeod Drive while attempting to continue eastbound onto E. Tompkins Avenue. The vehicles collided in the intersection, with the front of Morgan's car striking the side of the Montara Meadows bus. As a result of the collision, Morgan's vehicle was totaled. Worse, Morgan also sustained serious injuries which required emergency medical treatment and admission to Sunrise Hospital.

In the two years after the accident, Morgan underwent a series of treatments and procedures for his injuries, including bilateral medial branch block injections to his thoracic spine, injections to ease the pain from his bilateral triangular fibrocartilage tears, left wrist arthroscope and triangular fibrocartilage tendon repair with debridement. All told, these medical expenses exceeded $264,281.

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B. RELEVANT PROCEDURAL HISTORY.

On May 5, 2015, Morgan filed a complaint against Lujan and Harvest Management in which he asserted three causes of action: (1) negligence against David E. Lujan; (2) negligence per se against Lujan premised on his failure to obey traffic laws; and (3) vicarious liability / respondeat superior against Harvest Management Sub LLC. The Defendants jointly answered the complaint on June 16, 2015 with the assistance of Douglas J. Gardner, Esq. of Rands, South & Gardner. Mr. Gardner and his firm also represented both Defendants throughout the lengthy discovery period.[1]

The case then proceeded to trial in early November, 2017, where Mr. Gardner and his partner, Douglas Rands, continued to represent both Defendants jointly. Notably, during this first trial, Lujan testified that he was employed by Montara Meadows, a local entity under the purview of Harvest Management, at the time of the accident:

> [Morgan's counsel]: All right. Mr. Lujan, at the time of the accident in April of 2014, were you employed with Montara Meadows?
>
> [Lujan]: Yes.
>
> [Morgan's counsel]: And what was your employment?
>
> [Lujan]: I was the bus driver.
>
> [Morgan's counsel]: Okay. And what is your understanding of the relationship of Montara Meadows to Harvest Management?
>
> [Lujan]: Harvest Management was our corporate office.
>
> [Morgan's counsel]: Okay.
>
> [Lujan]: Montara Meadows is just the local --
>
> [Morgan's counsel]: Okay. All right. And this accident happened April 1, 2014, correct?
>
> [Lujan]: Yes, sir.[2]

---

[1] *See, e.g.*, Stipulation and Order to Extend Discovery ant [sic] Continue Trial Date First Request, filed August 30, 2016; Defendants David E. Lujan and Havest Management Sub LLC's Individual Pre-Trial Memorandum, filed September 25, 2017.

[2] *See* Transcript of Jury Trial, November 8, 2017, at page 109 (direct examination of Lujan).

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The trial was not completed, however, because the Court declared a mistrial on Day 3 on the basis of Defendants' counsel's misconduct.[3]

Following the mistrial, the case proceeded to a second trial in April 2018. Vicarious liability was not contested during trial.[4] Instead, Harvest Management's NRCP 30(b)(6) representative focused on primary liability by claiming that either Morgan or an unknown third party was primarily responsible for the accident.[5]

On the final day of trial, April 9, 2018, the Court *sua sponte* created a special verdict form that inadvertently included Lujan as the only Defendant in the caption.[6] The 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.
>
> [Defendants' 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.[7]

At the end of the six-day jury trial, written instructions were provided to the jury with the proper caption.[8] The jury used those instructions to deliberate and fill out the improperly-captioned special verdict form. Ultimately, the jury found Defendants to negligent and 100% at

---

[3] *See* Transcript from November 8, 2017, at pages 152-167, *especially* page 166; Court Minutes, November 8, 2017, on file herein.

[4] *See* Transcript of Jury Trial, April 5, 2018, at pages 165-78 (testimony of Erica Janssen, NRCP 30(b)(6) witness for Harvest Management); Transcript of Jury Trial, April 6, 2018, at pages 4-15 (same).

[5] *Id.*

[6] A copy of the special verdict form is attached hereto as **Exhibit 1**.

[7] *See* Transcript of Jury Trial, April 9, 2018, at pages 5-6, attached hereto as **Exhibit 2**.

[8] *See* Jury Instructions cover page, attached as **Exhibit 3**.

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fault for the accident.[9] In addition, the jury awarded Morgan $2,980,000 for past and future medical expenses as well as past and future pain and suffering.[10]

On April 26, 2018, the law firm of Bailey Kennedy substituted in as counsel of record for Harvest Management.[11] In May and early June of 2018, the parties and the Court dealt with residual issues and confusion relating to the Motion for Attorney Fees and Cost of Mistrial that Morgan withdrew on April 11, 2018, so that the motion may be addressed at once with his post-trial motion for attorney fees and costs.

On June 29, 2018, the Court filed a Civil Order to Statistically Close Case in which the box labeled "Jury – Verdict Reached" was checked. The following Monday, when Judge Bell assumed the role of Chief Judge, the case was reassigned to Department XI as part of the mass reassignment of cases that came with the new fiscal year.

On July 30, 2018, Morgan filed a Motion for Entry of Judgment in which it urged this Court to enter a written judgment against both Lujan and Harvest Management or, in the alternative, make an explicit finding in accordance with NRCP 49(a) that the jury's special verdict was rendered against both Defendants.

After the motion was thoroughly briefed,[12] the Court held a hearing during which it allowed oral arguments from the parties' counsel.[13] At the conclusion of the hearing, the Court verbally ruled that the inconsistency in the caption of the jury instructions and special verdict form was not enough to support judgment against both Defendants.[14]

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---

[9] *See* Exhibit 1.

[10] *Id.*

[11] As noted in the errata to the substitution, Bailey Kennedy is *not* counsel of record for Defendant Lujan. Instead, Rands, South & Gardner remains Lujan's legal counsel.

[12] *See generally* Harvest Management's Opposition filed on August 16, 2018, and four appendices thereto, as well as Morgan's Reply filed on September 7, 2018.

[13] *See* Minutes dated November 6, 2018, on file herein.

[14] *Id.*

A written Order Denying Morgan's Motion for Entry of Judgment followed on November 28, 2018. Then, on December 17, 2018, the Court entered a Judgment on the Jury Verdict against Lujan which totaled $3,046,382.72

On December 18, 2018, Morgan filed a Notice of Appeal in which he requested appellate review of the Order Denying Plaintiff's Motion for Entry of Judgment and Judgment Upon the Jury Verdict.[15] On December 27, 2018, Morgan's appeal was docketed in the Supreme Court as case number 77753.[16] As of December 31, 2018, the appellate matter has been assigned to the NRAP 16 Settlement Program. Consistent with NRAP 16(a)(1), transmission of necessary transcripts and briefing are stayed pending completion of the program.

III. LEGAL ARGUMENT

Harvest Management's new counsel has done a fine job Tuesday morning quarterbacking. Indeed, while Bailey Kennedy did not appear in this case until weeks *after* the jury reached its verdict, Harvest Management now seeks to unravel years of litigation with an after-the-fact assessment of what did and did not happen during the trial. Indeed, in moving this Court to enter judgment in its favor, Harvest Management hopes to use confusion and distorted portions of the record once again[17] to draw a conclusion that is wholly incorrect.

This Court should reject Harvest Management's efforts because, most importantly, (A) Morgan's timely notice of appeal divested this Court of jurisdiction and (B) the Motion for Entry of Judgment is improper under *SFPP, L.P. v. Second Judicial District Court.* Alternatively, even if this Court believes it is proper to rule upon Harvest Management's motion, this Court should (C) transfer the case back to Department VII because Judge Bell presided over the trial in question; (D) deny the motion as a rehash of Harvest Management's previous request for NRCP 49(a) relief, (E) deny the motion as unsupported by the record; and/or (F) reject the

[15] The Notice of Appeal is attached hereto as **Exhibit 4**.

[16] *See* Supreme Court Register, attached hereto as **Exhibit 5**.

[17] Morgan does not dispute the fact that this Court sided with Harvest Management in denying his Motion for Entry of Judgment. But, with all due respect for this Court, Morgan continues to believe that the decision was misguided.

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motion as a matter of law because the vicarious liability / respondeat superior claim against Harvest Management is derivative of the other claims which were already tried by consent.

A. MORGAN'S NOTICE OF APPEAL DIVESTED THIS COURT OF JURISDICTION.

"The point at which jurisdiction is transferred must [ ] be sharply delineated." *Rust v. Clark Cnty. Sch. Dist.*, 103 Nev. 686, 688-89, 747 P.2d 1380, 1382 (1987). The reason for this rule is obvious, as scarce judicial resources are wasted and confusion ensues when multiple courts address the same issues at the same time. To this end, the Supreme Court of Nevada has repeatedly held that "a timely notice of appeal divests the district court of jurisdiction" to "revisit issues that are pending before [the Supreme Court]." *Mack-Manley v. Manley*, 122 Nev. 849, 855-56, 138 P.3d 525, 530 (2006); *see also Foster v. Dingwall*, 126 Nev. 49, 52, 228 P.3d 453, 455, 2010 WL 1407139[18] (2010). Stated inversely, once a notice of appeal has been filed, district courts are limited to entering orders "on matters that are collateral to and independent from the appealed order, i.e., matters that in no way affect the appeal's merits." *Mack-Manley*, 122 Nev. at 855, 138 P.3d at 530.

Here, it is undeniable that Harvest Management filed the instant motion after Morgan filed his Notice of Appeal. As such, this Court lacks jurisdiction to revisit the Order Denying Morgan's Motion for Entry of Judgment, the Judgment Upon Jury Verdict, or related substantive issues unless jurisdiction is returned to the Court pursuant to the *Huneycutt*[19] procedure.

Under *Huneycutt*, district courts may consider NRCP 60(b) motions for relief from judgment or order which involve the same issues that are pending before the Supreme Court of Nevada. *Foster*, 126 Nev. at 52, 228 P.3d at 455 ("[T]he district court nevertheless retains a limited jurisdiction to review motions made in accordance with this procedure"). However, the Court's decision-making authority is limited to denying the motion for a relief from judgment or

[18] Because the Supreme Court of Nevada issued two opinions in *Foster v. Dingwall*, the Westlaw citation is provided for the sake of clarity and should not be misinterpreted as a citation to an unpublished decision.

[19] *See Huneycutt v. Huneycutt*, 94 Nev. 79, 575 P.2d 585 (1978).

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certifying to the Supreme Court of Nevada its inclination to revisit the issues. *See Foster*, 126 Nev. at 52-53, 228 P.3d at 455; *Huneycutt*, 94 Nev. at 80-81, 575 P.2d at 585. Under the latter scenario, it is then up to the Supreme Court to decide, in its discretion, whether a remand is necessary or whether the appeal should proceed as is. *See Mack-Manley*, 122 Nev. at 856, 138 P.3d at 530; *see also Post v. Bradshaw*, 422 F.3d 419, 422 (6th Cir. 2005) (noting that appellate courts do not "rubber-stamp" or grant such motions for remand as a matter of course)

In this case, Harvest Management has not filed an NRCP 60(b) motion or otherwise indicated that it is seeking to use the *Huneycutt* procedure to revisit the issues that are already before the Supreme Court of Nevada. As such, this Court should decline to entertain the Motion for Entry of Judgment because Morgan's timely notice of appeal divested this Court of jurisdiction to make non-collateral decisions. And, on a similar note, because the Order Denying Plaintiff's Motion for Entry of Judgment involved the exact same issue as the motion currently before the Court – whether the jury's verdict supported a judgment against both Defendants – there is no way this Court can rule upon Harvest Management's motion without infringing upon the Appellate Court's jurisdiction. Thus, the Motion for Entry of Judgment must be denied.

B. THE MOTION FOR ENTRY OF JUDGMENT IS IMPROPER UNDER *SFPP, L.P. V. SECOND JUDICIAL DIST. COURT.*

"[O]nce a district court enters a final judgment, that judgment cannot be reopened except under a timely motion sanctioned by the Nevada Rules of Civil Procedure." *SFPP, L.P. v. Second Judicial Dist. Court*, 123 Nev. 608, 612, 173 P.3d 715, 717 (2007); *see also Greene v. Eighth Judicial Dist. Court*, 115 Nev. 391, 396, 990 P.2d 184, 187 (1999) ("Once a judgment is final, it should not be reopened except in conformity with the Nevada Rules of Civil Procedure"). The rationale for this rule centers on the word "final." After all, multiple "final judgments" within a single action would be wholly inconsistent with the norm that a final judgment "puts an end to an action at law." *Greene*, 115 Nev. at 395, 990 P.2d at 186 (citing BLACK'S LAW DICTIONARY 843 (6th ed.1990)); *see also Lee v. GNLV Corp.*, 116 Nev. 424, 426, 996 P.2d 416, 417 (a final judgment is one that disposes of all the issues presented in the case). More importantly, attempts to undermine the finality of judgments without a proper judgment

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would also cause serious procedural, jurisdictional, and practical difficulties. *Greene*, 115 Nev. at 395, 990 P.2d at 186 ("Our rules of appellate procedure rely on the existence of a final judgment as an unequivocal substantive basis for our jurisdiction. . . . Permitting such amendments would create procedural and jurisdictional difficulties.").

Here, this Court's Judgment on the Jury Verdict was a "final judgment" which Morgan properly appealed under NRAP 3A(b)(1). So, under *SFPP, L.P.*, this Court lacks jurisdiction to reopen, revisit, or supplement the judgment "absent a proper and timely motion" which sets aside or vacates the judgment. 123 Nev. at 612, 173 P.3d at 717. As such, this Court must reject Harvest Management's Motion for Entry of Judgment because doing so would impermissibly alter the final judgment that is already on appeal.

C. JUDGE BELL IS BETTER EQUIPPED TO ADDRESS THE MOTION BECAUSE SHE PRESIDED OVER THE TRIAL.

Harvest Management's Motion for Entry of Judgment would not even be before this Court if it were not for Judge Bell *accidentally*[20] failing to update the caption on the special verdict form that she recycled. After all, if the special verdict form had been updated to include a correct caption and the word "Defendants," Morgan's request for entry of judgment would have been a simple administrative matter that required no review of the record.[21] Yet, because of Judge Bell's minor error, the parties have essentially re-litigated the entire case in an attempt to demonstrate what actually happened.

Given the circumstances, this Court has done an admirable job getting up to speed. Nevertheless, and with all due respect, the issues raised in Harvest Management's Motion for Entry of Judgment would be better addressed by Judge Bell because of her experience presiding over this case from the very beginning through the completion of trial. In this regard, the Motion for Entry of Judgment implicates the *Hornwood v. Smith's Food King No. 1* decision in which

[20] The record confirms the mistake was unintentional since Judge Bell explicitly noted "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." Transcript of Jury Trial, April 9, 2018, at page 5-6

[21] Granted, Harvest Management theoretically would have then had an opportunity to file post-trial motions. But, the entire burden of proof is much different under the relevant Rules.

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the Supreme Court of Nevada recognized that the District Court that presided over a trial was in the best position to re-assess the evidence and award consequential damages. *See* 105 Nev. 188, 191, 772 P.2d 1284, 1286 (1989). Similarly, because the motion requires significant consideration of this case's history and the evidence at trial, other Supreme Court decisions which note the special knowledge of presiding judges are also pertinent. *See, e.g., Wolff v. Wolff*, 112 Nev. 1355, 1359, 929 P.2d 916, 919 (1996) ("This court's rationale for not substituting its own judgment for that of the district court, absent an abuse of discretion, is that the district court has a better opportunity to observe parties and evaluate the situation"); *Winn v. Winn*, 86 Nev. 18, 20, 467 P.2d 601, 602 (1970) ("The trial judge's perspective is much better than ours for we are confined to a cold, printed record."); *Wittenberg v. Wittenberg*, 56 Nev. 442, 55 P.2d 619, 623 (1936) ("[M]uch must be left to the wisdom and experience of the presiding judge, who sees and hears the parties and their witnesses, scrutinizes their testimony and studies their demeanor.").

Thus, while Morgan appreciates the reasons why Judge Bell's cases were reassigned upon her becoming Chief Judge, it is more sensible to re-assign this case back to Judge Bell for a determination from the Presiding Judge regarding the issues that were litigated, the full extent of the jury's decision, and the meaning (or lack thereof) behind the mistaken special verdict form.

D. HARVEST MANAGEMENT'S MOTION CREATES A POTENTIAL JURISDICTIONAL GAP SINCE THIS COURT ALREADY RULED ON NRCP 49.

In his July 30, 2018, Motion for Entry of Judgment, Morgan argued that this Court should make an explicit finding pursuant to NRCP 49(a) that the special verdict was rendered against both Defendants.

NRCP 49(a) provides that courts may require a jury to return a special verdict upon issues of fact that are susceptible to categorical or brief answers. In doing so, "[t]he court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue." *Id.* But, if the court omits any issue of fact raised by the pleadings or by the evidence and none of the parties submission of the omitted issue(s) to the jury," then the Court may make its own finding.

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In its Opposition, Harvest Management argued that Morgan's reliance upon NRCP 49(a) was erroneous because Morgan "request[ed] that the Court engage in reversible error by determining the ultimate liability of party – rather than an issue of fact, as contemplated by [the Rule."[22] In denying Morgan's Motion for Entry of Judgment in its entirety, this Court apparently agreed with Harvest Management's argument regarding NRCP 49(a). Indeed, while the Court's written order is short and to the point, the Court necessarily had to find NRCP 49(a) inapplicable to the instant case.

Having prevailed on this issue, Harvest Management now argues that this Court should enter "judgment in favor of Harvest on any and all claims for relief alleged by Plaintiff Aaron Morgan."[23] Aside from the fact that its request is a complete 180 from a previously asserted position, Harvest Management's motion is problematic because it effectively asks this Court to revisit a previously decided issue. If this Court already decided that it cannot – or should not – make its own determination of facts, especially as to ultimate liability, there is no reason to revisit the issue simply because another party made the request. And, to make matters worse, if the Court were to revisit a previously decided issue which is also on appeal, a jurisdictional and procedural nightmare would ensure. Thus, this Court should reject Harvest Management's motion because it effectively undermines the Court's own previous decision. Indeed, because Harvest Management prevailed against Morgan on his motion for entry of judgment, Harvest cannot now offer a different set of rules of its own convenience as a matter of judicial estoppel. *See Marcuse v. Del Webb, Communities*, 123 Nev. 278, 287, 163 P.3d 462, 468-69 (2007).

E. THE MOTION FAILS ON THE MERITS BECAUSE IT IS UNSUPPORTED BY THE RECORD.

Harvest Management would have this Court believe that Morgan "made a conscious choice and/or strategic decision to abandon his claim against Harvest at trial."[24] In reality, the

[22] *See* page 3.

[23] Motion for Entry of Judgment at page 1.

[24] *Id.* at page 14.

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record confirms that Harvest Management and its corporate representative were identified as Defendants during trial. Harvest Management and Lujan were represented by the same counsel at both trials. Lujan attended the first trial, while Harvest Management'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 Management's counsel introduced her to the jury venire as his client before jury selection started:

> [Harvest Management'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. . . .[25]

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 Management's counsel]: Yeah.
>
> THE COURT: All right. What does your client prefer to be called?
>
> [Harvest Management'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 Management's counsel]: No, she's the representative of the --
>
> THE COURT: She's the representative. Oh, okay.
>
> [Harvest Management's counsel]: -- of the corporation.
>
> THE COURT: I thought --
>
> [Harvest Management's counsel]: Mr. Lujan is the --
>
> THE COURT: Got it. Okay. It's a different -- different person.[26]

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

[25] Transcript of Jury Trial, April 2, 2018, at page 17.

[26] *Id.* at pages 94-95.

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three separate questions about liability for corporate defendants, including one posed by Harvest Management.[27]

During opening statements, both parties also addressed the fact that Lujan was acting in the course and scope of his employment at the time of the accident.[28] Thereafter, Harvest Management's NRCP 30(b)(6) representative also stated that she was testifying on behalf of Harvest Management, was authorized to do so, and was aware of the fact that Lujan, the driver, was a Harvest Management employee.[29] Similarly, Morgan also established the employee-employer relationship between the Defendants by reading Lujan's testimony from the first trial into the record.[30] And, even as the parties wrapped up with closing arguments, both parties' referenced responsibility and agreed that Lujan, Harvest Management's employee, should not have pulled in front of Morgan when Morgan had the right of way.[31]

Thus, by the conclusion of the trial, the jury was aware of the fact that Morgan pursued claims again *both* Defendants. Moreover, the jurors received significant evidence regarding the relationship between the Defendants which established the facts necessary to prove vicarious liability. It thus would be a mistake to enter judgment in favor of Harvest Management when the record supports Morgan's claim for vicarious liability.

F. VICARIOUS LIABILITY / RESPONDEAT SUPERIOR IS A DERIVATIVE CLAIM THAT WAS ALREADY TRIED BY CONSENT.

The doctrine of respondeat superior subjects an employer to vicarious liability for torts that its employee committed within the scope of his or her employment. *See, e.g., McCrosky v. Carson Tahoe Reg'l Med. Ctr.*, 133 Nev. Adv. Op. 115, 408 P.3d 149, 152 (2017) (Vicarious

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[27] *Id.* at pages 47, 213, 232.

[28] Transcript of Jury Trial, April 3, 2018, at page 126; *see also id.* at page 147 (statement from Harvest Management's counsel: "[W]e're going to show you the actions of our driver were not reckless.").

[29] Transcript of Jury Trial, April 5, 2018, at pages 165, 171; see also Transcript of Jury Trial, April 6, 2018, at pages 6-14.

[30] Transcript of Jury Trial, April 6, 2018, at pages 191-96.

[31] Transcript of Jury Trial, April 6, 2018, at pages 122-23, 143.

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liability simply describes the burden "a supervisory party . . . bears for the actionable conduct of a subordinate"). Although the employer's liability is separate from the employee's *direct liability*, vicarious liability claims are nevertheless derivated in that the employee's negligence is imputed to his or her employer. *Id.*; *see also* BLACK'S LAW DICTIONARY 934 (8th ed. 2004) (defining "vicarious liability" as "[l]iability that a supervisory party (such as an employer) bears for the actionable conduct of a subordinate or associate (such as an employee) based on the relationship between the two parties." And, because of that imputation of negligence, vicarious liability subjects an employer to liability "for employee torts committed within the scope of employment, distinct from whether the employer is subject to direct liability." RESTATEMENT (THIRD) OF AGENCY, § 7.07, cmt. b, ¶ 4 (2006); *see also* RESTATEMENT (SECOND) OF JUDGMENTS § 51, cmt. a (1982) (noting that "the [employer] may be held liable even though an action cannot be maintained against the [employee]."); NRS 41.130 ("[W]here the person causing the injury is employed by another person or corporation responsible for the conduct of the person causing the injury, that other person or corporation so responsible is liable to the person injured for damages.").

In this case, the issue of vicarious liability / respondeat superior was tried by consent. Indeed, while Harvest Management tries to argue that Morgan's claim was actually for negligent entrustment or that his claim failed for lack of a specific allegation that Lujan was driving in the course and scope of his employment, any such failings are beside the point under NRCP 15(b). NRCP 15(b) provides, "[w]hen issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." So, because Harvest Management did not object – and, in fact, contributed to – the evidence and discussions regarding the employee-employer relationship and its role as a corporate defendant, Harvest Management cannot now argue that it is entitled to judgment in its favor. *See, e.g.*, *Schmidt v. Sadri*, 95 Nev. 702, 705, 601 P.2d 713, 715 (1979) ("[I]t is rudimentary that when an issue not raised by the pleadings is tried by express or implied consent of the parties, those issues shall be treated as if they were raised in the pleadings."); *Whiteman v. Brandis*, 78 Nev. 320, 322, 372 P.2d 468, 469 (1962) ("[T]he result of the trial must be upheld

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because evidence supporting a [specific claim] recovery was received without objection and the issues thereby raised were tried with the implied consent of the parties.").

Likewise, the distinction between primary liability and an employer's separate, vicarious liability also defeats Harvest Management's argument. After all, Lujan was acting in the course and scope of his employment as a bus driver when he collided with Morgan.[32] Given the jury's verdict, it is also established that Lujan was negligent and 100% at fault for the accident. So, regardless of what role Harvest Management played (or did not play) in the trial, Lujan's negligence is imputed to Harvest Management because of the employee-employer relationship. It would thus be erroneous to enter judgment in favor of Harvest Management because such a judgment would be inconsistent with the jury's verdict.

IV. CONCLUSION

For the foregoing reasons, this Court should deny Harvest Management's Motion for Entry of Judgment outright, without even considering the merits of the motion. Alternatively, even if this Court believes it is proper to rule upon the motion despite the pending appeal, this Court should transfer the case back to Judge Bell for a ruling because Judge Bell lived through the entirety of this case, including the trial. Yet, even if this Court is inclined to review the motion itself and make a ruling on the merits, it should nevertheless deny the Motion for Entry of Judgment because Harvest Management cannot flip its position regarding NRCP 49, the record

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[32] *See, e.g.*, Transcript of Jury Trial, April 3, 2018, at page 147 ([W]e're going to show you the actions of our driver were not reckless. They weren't wild."); Transcript of Jury Trial, April 6, 2018, at page 14 (stating "our driver" completed the "Accident Information Card, Other Vehicle."); Transcript of Jury Trial, April 6, 2018, at pages 191-94 (testimony of Lujan that he was the bus driver for Montera Meadows, a local entity under the control of Harvest Management's corporate office).

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does not support a judgment in favor of Harvest Management, and vicarious liability / respondeat superior was tried by consent.

Dated this 15th day of January, 2019.

MARQUIS AURBACH COFFING

By: Kathleen Wilde

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing **OPPOSITION TO DEFENDANT HARVEST MANAGEMENT SUB LLC'S MOTION FOR ENTRY OF JUDGMENT AND COUNTER-MOTION TO TRANSFER CASE BACK TO CHIEF JUDGE BELL FOR RESOLUTION OF POST-VERDICT ISSUES** was submitted electronically for filing and/or service with the Eighth Judicial District Court on the 15th day of January, 2019. Electronic service of the foregoing document shall be made in accordance with the E-Service List as follows:[33]

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Marquis Aurbach Coffing

[33] Pursuant to EDCR 8.05(a), each party who submits an E-Filed document through the E-Filing System consents to electronic service in accordance with NRCP 5(b)(2)(D).

Exhibit 1

Special Verdict Form
Filed April 9, 2018

FILED IN OPEN COURT
STEVEN D. GRIERSON
CLERK OF THE COURT
APR - 9 2018
BY: A.M. BROWN, DEPUTY

DISTRICT COURT

CLARK COUNTY, NEVADA

CASE NO: A-15-718679-C

DEPT. NO: VII

AARON MORGAN,

Plaintiff,

vs.

DAVID LUJAN,

Defendant.

SPECIAL VERDICT

We, the jury in the above-entitled action, find the following special verdict on the questions submitted to us:

QUESTION NO. 1: Was Defendant negligent?

ANSWER: Yes ✓ No _____

If you answered no, stop here. Please sign and return this verdict.

If you answered yes, please answer question no. 2.

QUESTION NO.2: Was Plaintiff negligent?

ANSWER: Yes _____ No ✓

If you answered yes, please answer question no. 3.

If you answered no, please skip to question no. 4.

///

A-15-718679-C
SJV
Special Jury Verdict
4736215

2

QUESTION NO. 3: What percentage of fault do you assign to each party?

Defendant: 100

Plaintiff: 0

Total: 100%

Please answer question 4 without regard to you answer to question 3.

QUESTION NO. 4: What amount do you assess as the total amount of Plaintiff's damages? (Please do not reduce damages based on your answer to question 3, if you answered question 3. The Court will perform this task.)

Past Medical Expenses	$ 208,480.00
Future Medical Expenses	$ 1,156,500.00
Past Pain and Suffering	$ 116,000.00
Future Pain and Suffering	$ 1,500,000.00
TOTAL	$ 2,980,980.00

DATED this 9th day of April, 2018.

Arthur J. St. Laurent

FOREPERSON

ARTHUR J. ST. LAURENT

Exhibit 2

Transcript of Jury Trial,
April 9, 2018, at pages 5-6

Electronically Filed
5/9/2018 10:36 AM
Steven D. Grierson
CLERK OF THE COURT

RTRAN

DISTRICT COURT

CLARK COUNTY, NEVADA

AARON MORGAN, Plaintiff, vs. DAVID LUJAN Defendant.	CASE#: A-15-718679-C DEPT. VII

BEFORE THE HONORABLE **LINDA MARIE BELL**, DISTRICT COURT JUDGE

MONDAY, APRIL 9, 2018

RECORDER'S TRANSCRIPT OF HEARING
CIVIL JURY TRIAL

APPEARANCES:

For the Plaintiff: BRYAN BOYACK, ESQ.
BENJAMIN CLOWARD, ESQ.

For the Defendant: DOUGLAS GARDNER, ESQ.
DOUGLAS RANDS, ESQ.

RECORDED BY: RENEE VINCENT, COURT RECORDER

Case Number: A-15-718679-C

mention there was a subsequent motor vehicle accident and he said he was fine and I never pursued that.

THE COURT: All right. So, anything else, Mr. Cloward?

MR. CLOWARD: Okay. No. I just wanted to make sure that the doctor was aware of that.

THE COURT: Great. Sir, if you want to just have a seat right here we're going to bring the jury in and then we'll have you come up to the stand once they're in. Just wherever, wherever you like.

MR. RANDS: Mr. Gardner just texted me. He's in the elevator, so he'll be here.

THE COURT: Good. In 10 or 15 minutes he'll be here.

MR. RANDS: Ten or fifteen minutes, exactly, the elevators here.

[Pause]

MR. GARDNER: Your Honor, I'm sorry.

THE COURT: This one's for Mr. Gardner.

All right. Can you bring in the jury? All right. Mr. Rands, here's your jury instructions.

MR. RANDS: Thank you, Your Honor.

THE COURT: Take a look and see if -- will you guys look at that verdict form? I know it doesn't have the right caption. I know it's just the one we used the last trial. See if that looks sort of okay.

MR. RANDS: Yeah. That looks fine.

THE COURT: I don't know if it's right with what you're asking for for damages, but it's just what we used in the last trial which was similar

sort of.

THE MARSHAL: Please rise for the jury.

[Jury in at 9:13 a.m.]

THE COURT: We're back on the record in case number 8718679, Morgan v. Lujan. [indiscernible] Counsel and parties. Good morning, everyone. I hope you had a good weekend.

Mr. Gardner and Mr. Rands, if you'll please call your next witness.

MR. GARDNER: Yes, Dr. Sanders.

THE MARSHAL: Doctor, up here, please. If you would remain standing, raise your right hand, and face the clerk, please.

STEVEN SANDERS

[having been called as a witness and being first duly sworn testified as follows:]

THE COURT: Good morning, sir. Go ahead and have a seat, please. And if you'll please state your name and spell it for the record.

THE WITNESS: Steven Sanders, S-T-E-V-E-N, Sanders, S-A-N-D-E-R-S.

THE COURT: Thank you. Whenever you're ready, Mr. Gardner.

DIRECT EXAMINATION

BY MR. GARDNER:

Q Good morning, Doctor.

A Good morning.

Q Thank you for being here sincerely. Why don't you tell the jury

Exhibit 3

Jury Instructions Cover Page

JI

FILED IN OPEN COURT
STEVEN D. GRIERSON
CLERK OF THE COURT
APR - 9 2018
BY, AJA M. BROWN, DEPUTY

DISTRICT COURT

CLARK COUNTY, NEVADA

AARON M. MORGAN Plaintiff, vs. DAVID E. LUJAN, HARVEST MANAGEMENT SUB LLC Defendants.	CASE NO.: A-15-718679-C DEPT. NO.: VII

JURY INSTRUCTIONS

A-16-718679-C
JI
Jury Instructions
4738216

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Exhibit 4

Notice of Appeal
Filed 12/18/18

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DISTRICT COURT

CLARK COUNTY, NEVADA

AARON M. MORGAN, individually, Plaintiff, vs. DAVID E. LUJAN, individually; HARVEST MANAGEMENT SUB LLC; a Foreign Limited-Liability Company; DOES 1 through 20; ROE BUSINESS ENTITIES 1 through 20, inclusive jointly and severally, Defendants.	Case No.: A-15-718679-C Dept. No.: XI

NOTICE OF APPEAL

Plaintiff, Aaron M. Morgan, by and through his attorneys of record, Marquis Aurbach Coffing and the Richard Harris Law Firm, hereby appeals to the Supreme Court of Nevada from: (1) the Order Denying Plaintiff's Motion for Entry of Judgment, which was filed on

November 28, 2018 and is attached as **Exhibit 1**; and (2) the Judgment Upon the Jury Verdict, which was filed on December 17, 2018 and is attached as **Exhibit 2**.

Dated this 18th day of December, 2018.

MARQUIS AURBACH COFFING

By /s/ Micah S. Echols
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CERTIFICATE OF SERVICE

I hereby certify that the foregoing **NOTICE OF APPEAL** was submitted electronically for filing and/or service with the Eighth Judicial District Court on the 18th day of December, 2018. Electronic service of the foregoing document shall be made in accordance with the E-Service List as follows:[1]

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/s/ Leah Dell
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Marquis Aurbach Coffing

[1] Pursuant to EDCR 8.05(a), each party who submits an E-Filed document through the E-Filing System consents to electronic service in accordance with NRCP 5(b)(2)(D).

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Exhibit 1

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Attorneys for Defendant
HARVEST MANAGEMENT SUB LLC

DISTRICT COURT

CLARK COUNTY, NEVADA

PLEASE NOTE DEPT. CHANGE

AARON M. MORGAN, individually, Plaintiff, vs. DAVID E. LUJAN, individually; HARVEST MANAGEMENT SUB LLC; a Foreign-Limited-Liability Company; DOES 1 through 20; ROE BUSINESS ENTITIES 1 through 20, inclusive jointly and severally, Defendants.	Case No. A-15-718679-C Dept. No. [redacted] XI **ORDER ON PLAINTIFFS' MOTION FOR ENTRY OF JUDGMENT** **Date of Hearing: November 6, 2018** **Time of Hearing: 9:00 A.M.**

On November 6, 2018, at 9:00 a.m., the Motion for Entry of Judgment came before the Court. Tom W. Stewart of Marquis Aurbach Coffing P.C. and Bryan A. Boyack of Richard Harris Law Firm appeared on behalf of Plaintiff Aaron Morgan and Dennis L. Kennedy, Sarah E. Harmon, and Andrea M. Champion of Bailey❖Kennedy appeared on behalf of Defendant Harvest Management Sub LLC.

///

The Court, having examined the briefs of the parties, the records and documents on file, and having heard argument of counsel, and for good cause appearing,

HEREBY ORDERS that the Motion for Entry of Judgment shall be, and hereby is, **DENIED**.

DATED this 26 day of November, 2018.

DISTRICT COURT JUDGE

Respectfully submitted by:

BAILEY❖KENNEDY, LLP

By: _____
DENNIS L. KENNEDY
SARAH E. HARMON
JOSHUA P. GILMORE
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Attorneys for Defendant Harvest Management Sub LLC

Approved as to form and content by:

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By: _____
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Attorneys for Defendant
HARVEST MANAGEMENT SUB LLC

DISTRICT COURT

CLARK COUNTY, NEVADA

PLEASE NOTE DEPT. CHANGE

AARON M. MORGAN, individually,

Plaintiff,

vs.

DAVID E. LUJAN, individually; HARVEST MANAGEMENT SUB LLC; a Foreign-Limited-Liability Company; DOES 1 through 20; ROE BUSINESS ENTITIES 1 through 20, inclusive jointly and severally,

Defendants.

Case No. A-15-718679-C
Dept. No. [redacted] XI

ORDER ON PLAINTIFFS' MOTION FOR ENTRY OF JUDGMENT

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///

The Court, having examined the briefs of the parties, the records and documents on file, and having heard argument of counsel, and for good cause appearing,

HEREBY ORDERS that the Motion for Entry of Judgment shall be, and hereby is, **DENIED**.

DATED this 26 day of November, 2018.

DISTRICT COURT JUDGE

Respectfully submitted by:

BAILEY❖KENNEDY, LLP

By: _____
DENNIS L. KENNEDY
SARAH E. HARMON
JOSHUA P. GILMORE
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Attorneys for Defendant Harvest Management Sub LLC

Approved as to form and content by:

MARQUIS AURBACH COFFING P.C.

By: _____
MICAH S. ECHOLS
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Attorneys for Plaintiff Aaron Morgan

Exhibit 5

Supreme Court Register

Nevada

Appellate Courts

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Only filed documents can be viewed. Some documents received in a case may not be available for viewing.
Some documents originating from a lower court, including records and appendices, may not be available for viewing.
For official records, please contact the Clerk of the Supreme Court of Nevada at (775) 684-1600.

Case Information: 77753

Short Caption:	MORGAN VS. LUJAN	**Court:**	Supreme Court
Lower Court Case(s):	Clark Co. - Eighth Judicial District - A718679	**Classification:**	Civil Appeal - General - Other
Disqualifications:		**Case Status:**	Settlement Notice Issued/Briefing Suspended
Replacement:		**Panel Assigned:**	Panel
To SP/Judge:	12/31/2018 / Shirinian, Ara	**SP Status:**	Pending
Oral Argument:		**Oral Argument Location:**	
Submission Date:		**How Submitted:**	

+ Party Information

+ Due Items

Docket Entries

Date	Type	Description	Pending?	Document
12/27/2018	Filing Fee	Filing Fee due for Appeal. Filing fee will be forwarded by the District Court. (SC)		
12/27/2018	Notice of Appeal Documents	Filed Notice of Appeal. Appeal docketed in the Supreme Court this day. (Docketing statement mailed to counsel for appellant.) (SC)		18-910662
12/27/2018	Notice/Outgoing	Issued Notice of Referral to Settlement		18-910664

		Program. This appeal may be assigned to the settlement program. Timelines for requesting transcripts and filing briefs are stayed. (SC)	
12/28/2018	Filing Fee	Filing Fee Paid. $250.00 from Marquis Aurbach Coffing. Check no. 125755. (SC)	
12/31/2018	Settlement Notice	Issued Notice: Assignment to Settlement Program. Issued Assignment Notice to NRAP 16 Settlement Program. Settlement Judge: Ara H. Shirinian. (SC).	18-910922
01/15/2019	Order/Clerk's	Filed Order Granting Extension Per Telephonic Request. Appellant's Docketing Statement due: January 30, 2019. (SC).	19-02106

Combined Case View

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; DAVID E. LUJAN,

Real Parties in Interest.

Case No. 81975

PETITIONER'S APPENDIX, VOLUME 25
(Nos. 3783–3959)

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Attorneys for Petitioner, Aaron M. Morgan

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4	Plaintiff's First Set of Interrogatories to Defendant Harvest Management Sub LLC (served 04/14/2016)	Vol. 12, 1982–1991
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9	Excerpted Transcript of November 7, 2017, Jury Trial, Day 2 (filed 02/08/2018)	Vol. 15, 2321–2347
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DOCUMENT DESCRIPTION		LOCATION
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DOCUMENT DESCRIPTION		LOCATION
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<tr><td>4</td><td>Defendant Harvest Management Sub LLC's Opposition to Plaintiff's Motion for Entry of Judgment (filed 08/16/2018)</td><td>Vol. 27, 4154–4180</td></tr>
<tr><td>5</td><td>Notice of Entry of Order on Plaintiff's Motion for Entry of Judgment (filed 11/28/2018)</td><td>Vol. 27, 4181–4186</td></tr>
<tr><td>6</td><td>Excerpted Transcript of November 6, 2018 hearing on Plaintiff's Motion for Entry of Judgment (filed 01/18/2019)</td><td>Vol. 27, 4187–4191</td></tr>
<tr><td>7</td><td>Notice of Entry of Judgment Upon Jury Verdict (filed 01/02/2019)</td><td>Vol. 27, 4192–4202</td></tr>
<tr><td>8</td><td>Notice of Appeal (filed 12/18/2018)</td><td>Vol. 27, 4203–4212</td></tr>
</table>

DOCUMENT DESCRIPTION		LOCATION
Exhibits to Respondent's Renewed Motion to Dismiss Appeal as Premature (cont.)		
9	Defendant Harvest Management Sub LLC's Motion for Entry of Judgment (filed 12/21/2018)	Vol. 27, 4213–4240
10	Decision and Order (filed 04/05/2019)	Vol. 27, 4241–4247
11	Supreme Court Order Denying Petition for Writ of Mandamus; Case No. 78596 (filed 05/15/2019)	Vol. 27, 4248–4250
12	Motion for Remand Pursuant to NRAP 12A; Supreme Court Case No. 77753	Vol. 27, 4251–4261
13	Respondent Harvest Management Sub LLC's Opposition to Motion for Remand Pursuant to NRAP 12A (filed 05/17/2019)	Vol. 27, 4262–4274
14	Supreme Court Order Denying Motion; Case No. 77753 (filed 07/31/2019)	Vol. 27, 4275–4276
Supreme Court Order Dismissing Appeal; Case No. 77753 (filed 09/17/2019)		Vol. 27, 4277–4278
Transcript of October 29, 2019 hearing on Defendant Harvest Management Sub LLC's Motion for Entry of Judgment (filed 02/19/2020)		Vol. 27, 4279–4283
Decision and Order (filed 01/03/2020)		Vol. 27, 4284–4294
Minute Order of January 14, 2020 hearing on setting trial date, status check and decision		Vol. 27, 4295
Transcript of January 14, 2020 of hearing on setting trial date, status check and decision (filed 02/12/2020)		Vol. 27, 4296–4301
District Court Docket, Case No. A-15-718679-C		Vol. 27, 4302–4309

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Attorneys for Respondent
HARVEST MANAGEMENT SUB LLC

IN THE SUPREME COURT OF THE STATE OF NEVADA

AARON M. MORGAN, individually, Appellant, vs. DAVID E. LUJAN, individually; and HARVEST MANAGEMENT SUB LLC, a foreign limited-liability company, Respondents.	Supreme Court No. 77753 District Court No. A-15-718679-C **RESPONDENT HARVEST MANAGEMENT SUB LLC'S MOTION TO DISMISS APPEAL AS PREMATURE**

RESPONDENT HARVEST MANAGEMENT SUB LLC'S MOTION TO DISMISS APPEAL AS PREMATURE

Respondent Harvest Management Sub LLC ("Harvest"), by and through its attorneys, the law firm of Bailey❖Kennedy, hereby moves to dismiss the Notice of Appeal filed by Appellant Aaron M. Morgan ("Mr. Morgan") on December 18, 2018. Mr. Morgan's Notice of Appeal is premature, as the district court has not yet entered a final judgment in the underlying action. Specifically, Mr. Morgan's claim against Harvest remains pending, subject to the district court's resolution of Harvest's Motion for Entry of Judgment, which is scheduled to be heard in chambers on January 25, 2019. Moreover, Mr. Morgan did not seek Nevada Rule of Civil Procedure 54(b) certification for the order or judgment appealed from. As such, this Court lacks jurisdiction over the appeal.

DATED this 23rd day of January, 2019.

BAILEY❖KENNEDY

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

Attorneys for Respondent
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MEMORANDUM OF POINTS AND AUTHORITIES

I. STATEMENT OF FACTS

On May 20, 2015, Mr. Morgan filed a Complaint against Harvest and Respondent David E. Lujan ("Mr. Lujan"). (Ex. 1.[1]) Mr. Morgan alleged claims for negligence and negligence per se against Mr. Lujan, and a claim for negligent entrustment against Harvest.[2] (Ex. 1, at 3:1-4:12.) In April 2018, this underlying case was tried to a jury, and the only claims presented to the jury for determination were the claims of negligence and negligence per se alleged against Mr. Lujan. (Ex. 2.[3])

On July 30, 2018, Mr. Morgan filed a Motion for Entry of Judgment seeking to have the district court enter the jury's verdict against Harvest, despite the fact that no claim for relief against Harvest was proven at trial or presented

/ / /

[1] A true and correct copy of the Complaint (May 20, 2015), filed in the underlying action, is attached hereto as Exhibit 1.

[2] The claim against Harvest is erroneously titled "vicarious liability/respondeat superior," but it is clearly a claim for negligent entrustment.

[3] A true and correct copy of the Special Verdict (Apr. 9, 2018), filed in the underlying action, is attached hereto as Exhibit 2.

to the jury for determination. (Ex. 3[4]; Ex. 4.[5]) On November 28, 2018, the district court denied Mr. Morgan's Motion, holding that the failure to include the claim against Harvest in the Special Verdict form was not a "clerical error," that no claim against Harvest had been presented to the jury for determination, and that a judgment could not be entered against Harvest based on the jury's verdict. (Ex. 5[6]; Ex. 6,[7] at 9:8-20.) Further, when Harvest sought clarification whether the judgment against Mr. Lujan would also dismiss all claims alleged against Harvest, the district court explicitly instructed Harvest that it would have to file a motion seeking such relief. (Ex. 6, at 9:18-10:8.)

On December 17, 2018, Mr. Morgan filed a Judgment Upon the Jury Verdict against Mr. Lujan. (Ex. 7.[8]) This judgment has not yet been entered by the district court.

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[4] A true and correct copy of Plaintiff's Motion for Entry of Judgment (July 30, 2018), filed in the underlying action, is attached hereto as Exhibit 3. The exhibits to this motion have been omitted in the interest of judicial economy and efficiency.

[5] A true and correct copy of Defendant Harvest Management Sub LLC's Opposition to Plaintiff's Motion for Entry of Judgment (Aug. 16, 2018), filed in the underlying action, is attached hereto as Exhibit 4. The exhibits to this motion have been omitted in the interest of judicial economy and efficiency.

[6] A true and correct copy of the Notice of Entry of Order on Plaintiff's Motion for Entry of Judgment (Nov. 28, 2018), filed in the underlying action, is attached hereto as Exhibit 5.

[7] A true and correct copy of excerpts from the Transcript of the Hearing on Plaintiff's Motion for Entry of Judgment (Jan. 18, 2019), is attached as Exhibit 6.

[8] A true and correct copy of the Judgment Upon the Jury Verdict (Dec. 17, 2018), filed in the underlying action, is attached as Exhibit 7.

On December 18, 2018, Mr. Morgan filed a Notice of Appeal from the November 28, 2018 Notice of Entry of Order Denying Plaintiff's Motion for Entry of Judgment and from the December 17, 2018 Judgment Upon the Jury Verdict. (Ex. 8.[9])

On December 21, 2018, Harvest filed a Motion for Entry of Judgment against Mr. Morgan as to the claim for relief that it seemingly abandoned and/or failed to prove at trial. (Ex. 9.[10]) This motion is fully briefed and scheduled to be heard, in chambers, on January 25, 2019.

Mr. Morgan has not yet filed a Docketing Statement establishing this court's jurisdiction for the appeal. The Docketing Statement was originally scheduled to be filed on January 16, 2019, but Mr. Morgan requested and was granted an extension until January 30, 2019.

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/ / /

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[9] A true and correct copy of the Notice of Appeal (Dec. 18, 2018), filed in the underlying action, is attached as Exhibit 8.

[10] A true and correct copy of Defendant Harvest Management Sub LLC's Motion for Entry of Judgment (Dec. 21, 2018), filed in the underlying action, is attached as Exhibit 9. The exhibits to the motion have been omitted in the interest of judicial economy and efficiency.

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II. ARGUMENT

Nevada Rule of Appellate Procedure 3A sets forth the judgments and orders from which a party may appeal. An order denying entry of judgment is not an appealable order under the Rules, and only final judgments (or interlocutory judgments in certain real property actions) are appealable. NRAP 3A(b)(1).

It is well-settled that "when multiple parties are involved in an action, a judgment is not final unless the rights and liabilities of all parties are adjudicated." *Rae v. All Am. Life & Cas. Co.*, 95 Nev. 920, 922, 605 P.2d 196, 197 (1979); *see also Lee v. GNLV Corp.*, 116 Nev. 424, 426, 996 P.2d 416, 417 (2000) ("[A] final judgment is one that disposes of all issues presented in the case, and leaves nothing for the future consideration of the court, except for post-judgment issues such as attorney's fees and costs."). When a judgment disposes of less than all of the claims against all of the parties, a party must seek certification of the judgment as final pursuant to Nevada Rule of Civil Procedure 54(b) before it can file an appeal from the judgment. "*In the absence of such determination and direction, any order or other form of*

decision, however designated, which adjudicates the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the parties . . . ." NRCP 54(b) (emphasis added).

Here, neither the Order Denying Plaintiff's Motion for Entry of Judgment ("Order") nor the Judgment Upon Jury Verdict ("Judgment"), individually or considered together, constitutes a final judgment. Neither the Order nor the Judgment disposes of all of the claims in the case. Mr. Morgan's claim against Harvest remains unresolved and is the subject of a pending Motion for Entry of Judgment in the district court. The district court clearly informed the Parties in November 2018, before Mr. Morgan filed his Notice of Appeal, that his claim against Harvest remained unresolved by the jury's verdict and that additional motions were necessary for its resolution. Mr. Morgan failed to seek Rule 54(b) certification for either the Order or the Judgment prior to filing his Notice of Appeal. Therefore, Mr. Morgan's appeal is premature and this Court lacks jurisdiction to hear the appeal.

/ / /

/ / /

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II. CONCLUSION

For the foregoing reasons, Mr. Morgan's appeal should be dismissed as premature. Mr. Morgan has failed to appeal from a final judgment.

DATED this 23rd day of January, 2019.

BAILEY❖KENNEDY

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

Attorneys for Respondent
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CERTIFICATE OF SERVICE

I certify that I am an employee of BAILEY❖KENNEDY and that on the 23rd day of January, 2019, service of the foregoing **RESPONDENT HARVEST MANAGEMENT SUB LLC'S MOTION TO DISMISS AS PREMATURE** was made by electronic service through 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 TOM W. STEWART **MARQUIS AURBACH COFFING** 1001 Park Run Drive Las Vegas, Nevada 89145	Email: mechols@maclaw.com tstewart@maclaw.com *Attorneys for Appellant* AARON M. MORGAN
BENJAMIN P. CLOWARD BRYAN A. BOYACK **RICHARD HARRIS LAW FIRM** 801 South Fourth Street Las Vegas, Nevada 89101	Email: Bbenjamin@richardharrislaw.com bryan@richardharrislaw.com *Attorneys for Appellant* AARON M. MORGAN
DOUGLAS J. GARDNER DOUGLAS R. RANDS **RANDS, SOUTH & GARDNER** 1055 Whitney Ranch Drive, Suite 220 Henderson, Nevada 89014	Email: dgardner@rsglawfirm.com drands@rsgnvlaw.com *Attorneys for Respondent* DAVID E. LUJAN
ARA H. SHIRINIAN 10651 Capesthorne Way Las Vegas, Nevada 89135	Email: arashirinian@cox.net *Settlement Program Mediator*

/s/ Josephine Baltazar
Employee of BAILEY❖KENNEDY

EXHIBIT 1

EXHIBIT 1

DISTRICT COURT CIVIL COVER SHEET

A-15-718679-C

County, Nevada

VII

Case No.

(Assigned by Clerk's Office)

I. Party Information *(provide both home and mailing addresses if different)*

Plaintiff(s) (name/address/phone):	Defendant(s) (name/address/phone):
Aaron M. Morgan	David E. Lujan; Harvest Management Sub LLC.
Attorney (name/address/phone):	Attorney (name/address/phone):
Adam W. Williams	
Richard Harris Law Firm	
801 S. 4th Street	
Las Vegas, Nevada 89101	

II. Nature of Controversy *(please select the one most applicable filing type below)*

Civil Case Filing Types

Real Property	Torts	
Landlord/Tenant	**Negligence**	**Other Torts**
☐ Unlawful Detainer	☒ Auto	☐ Product Liability
☐ Other Landlord/Tenant	☐ Premises Liability	☐ Intentional Misconduct
Title to Property	☐ Other Negligence	☐ Employment Tort
☐ Judicial Foreclosure	**Malpractice**	☐ Insurance Tort
☐ Other Title to Property	☐ Medical/Dental	☐ Other Tort
Other Real Property	☐ Legal	
☐ Condemnation/Eminent Domain	☐ Accounting	
☐ Other Real Property	☐ Other Malpractice	

Probate	Construction Defect & Contract	Judicial Review/Appeal
Probate *(select case type and estate value)*	**Construction Defect**	**Judicial Review**
☐ Summary Administration	☐ Chapter 40	☐ Foreclosure Mediation Case
☐ General Administration	☐ Other Construction Defect	☐ Petition to Seal Records
☐ Special Administration	**Contract Case**	☐ Mental Competency
☐ Set Aside	☐ Uniform Commercial Code	**Nevada State Agency Appeal**
☐ Trust/Conservatorship	☐ Building and Construction	☐ Department of Motor Vehicle
☐ Other Probate	☐ Insurance Carrier	☐ Worker's Compensation
Estate Value	☐ Commercial Instrument	☐ Other Nevada State Agency
☐ Over $200,000	☐ Collection of Accounts	**Appeal Other**
☐ Between $100,000 and $200,000	☐ Employment Contract	☐ Appeal from Lower Court
☐ Under $100,000 or Unknown	☐ Other Contract	☐ Other Judicial Review/Appeal
☐ Under $2,500		

Civil Writ		Other Civil Filing
Civil Writ		**Other Civil Filing**
☐ Writ of Habeas Corpus	☐ Writ of Prohibition	☐ Compromise of Minor's Claim
☐ Writ of Mandamus	☐ Other Civil Writ	☐ Foreign Judgment
☐ Writ of Quo Warrant		☐ Other Civil Matters

Business Court filings should be filed using the Business Court civil coversheet.

5/20/15

Date

Signature of initiating party or representative

See other side for family-related case filings.

Electronically Filed
05/20/2015 10:29:37 AM

CLERK OF THE COURT

COMP
ADAM W. WILLIAMS, ESQ.
Nevada Bar No. 13617
RICHARD HARRIS LAW FIRM
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Email Adam.Williams@richardharrislaw.com
Attorneys for Plaintiff

DISTRICT COURT

CLARK COUNTY, NEVADA

AARON M. MORGAN, individually

Plaintiff,

vs.

DAVID E. LUJAN, individually; HARVEST MANAGEMENT SUB LLC; a Foreign Limited-Liability Company; DOES 1 through 20; ROE BUSINESS ENTITIES 1 through 20, inclusive jointly and severally,

Defendants.

CASE NO.: A-15-718679-C
DEPT. NO.: VII

COMPLAINT

COMES NOW, Plaintiff AARON M. MORGAN, individually, by and through his attorney of record ADAM W. WILLIAMS, ESQ. of the RICHARD HARRIS LAW FIRM, and complains and alleges as follows:

JURISDICTION

1. That at all times relevant herein, Plaintiff AARON M. MORGAN (hereinafter referred to as "Plaintiff") is, a resident of Clark County, Nevada.
2. That at all times relevant herein, Defendant, DAVID E. LUJAN was, and is, a resident of Clark County, Nevada.

3. That at all times relevant herein, Defendant, HARVEST MANAGEMENT SUB LLC, was, and is, a foreign limited-liability Company licensed and actively conducting business in Clark County, Nevada

4. All the facts and circumstances that gave rise to the subject lawsuit occurred in Clark County, Nevada.

5. The identities of Defendant DOES 1 through 20, and ROE BUSINESS ENTITIES 1 through 20, are unknown at this time and are individuals, corporations, associations, partnerships, subsidiaries, holding companies, owners, predecessor or successor entities, joint venturers, parent corporations or related business entities of Defendants, inclusive, who were acting on behalf of or in concert with, or at the direction of Defendants and are responsible for the injurious activities of the other Defendants.

6. Plaintiff alleges that each named and Doe and Roe Defendant negligently, willfully, intentionally, recklessly, vicariously, or otherwise, caused, directed, allowed or set in motion the injurious events set forth herein.

7. Each named and Doe and Roe Defendant is legally responsible for the events and happenings stated in this Complaint, and thus proximately caused injury and damages to Plaintiff.

8. Plaintiff requests leave of the Court to amend this Complaint to specify the Doe and Roe Defendants when their identities become known.

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

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FIRST CAUSE OF ACTION
Negligence Against Employee Defendant, DAVID E. LUJAN

10. Plaintiff incorporates paragraphs 1 through 9 of the Complaint as though said paragraphs were fully set forth herein.

11. Defendant DAVID E. LUJAN owed Plaintiff a duty of care. Defendant DAVID E. LUJAN breached that duty of care.

12. As a direct and proximate result of the negligence of Defendant, Plaintiff was seriously injured and caused to suffer great pain of body and mind, some of which conditions are permanent and disabling all to her general damage in an amount in excess of $10,000.00.

SECOND CAUSE OF ACTION
Negligence Per Se Against Employee Defendant, DAVID E. LUJAN

13. Plaintiff incorporates paragraphs 1 through 12 of the Complaint as though said paragraphs were fully set forth herein.

14. The acts of Defendant DAVID E. LUJAN as described herein violated the traffic laws of the State of Nevada and Clark County, constituting negligence per se, and Plaintiff has been damaged as a direct and proximate result thereof in an amount in excess of $10,000.00.

THIRD CAUSE OF ACTION
Vicarious Liability/Respondeat Superior Against Defendant HARVEST MANAGEMENT SUB LLC.

15. Plaintiff incorporates paragraphs 1 through 14 of the Complaint as though said paragraphs were fully set forth herein.

16. Plaintiff is informed and believes that DAVID E. LUJAN was employed as a driver for Defendant HARVEST MANAGEMENT SUB LLC.

17. At all times mentioned herein, Defendant HARVEST MANAGEMENT SUB LLC. was the owner of, or had custody and control of, the Vehicle.

18. That Defendant HARVEST MANAGEMENT SUB LLC. did entrust the Vehicle to the control of Defendant DAVID E. LUJAN.

19. That Defendant DAVID E. LUJAN was incompetent, inexperienced, or reckless in the operation of the Vehicle.

20. That Defendant HARVEST MANAGEMENT SUB LLC. actually knew, or by the exercise of reasonable care should have known, that Defendant DAVID E. LUJAN was incompetent, inexperienced, or reckless in the operation of motor vehicles.

21. That Plaintiff was injured as a proximate consequence of the negligence and incompetence of Defendant DAVID E. LUJAN, concurring with the negligent entrustment of the Vehicle by Defendant HARVEST MANAGEMENT SUB LLC..

22. That as a direct and proximate cause of the negligent entrustment of the Vehicle by Defendant HARVEST MANAGEMENT SUB LLC. to Defendant DAVID E. LUJAN, Plaintiff has been damaged in an amount in excess of $10,000.00.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for relief and judgment against Defendants as follows:

1. General damages in an amount in excess of $10,000.00;
2. Special damages for medical and incidental expenses incurred and to be incurred;
3. Special damages for lost earnings and earning capacity;
4. Attorney's fees and costs off suit incurred herein; and
5. For such other and further relief as the Court may deem just and proper.

DATED this 20 day of May, 2015.

RICHARD HARRIS LAW FIRM

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801 S. Fourth Street
Las Vegas, Nevada 89101
Attorneys for Plaintiff

RICHARD HARRIS LAW FIRM

IAFD

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Attorneys for Plaintiff

RICHARD HARRIS LAW FIRM

DISTRICT COURT

CLARK COUNTY, NEVADA

AARON M. MORGAN, individually Plaintiff, vs. DAVID E. LUJAN, individually; HARVEST MANAGEMENT SUB LLC; a Foreign Limited-Liability Company; DOES 1 through 20; ROE BUSINESS ENTITIES 1 through 20, inclusive jointly and severally, Defendants.	CASE NO.: DEPT. NO.: **INITIAL APPEARANCE FEE DISCLOSURE**

Pursuant to NRS Chapter 19, as amended by Senate Bill 106, filing fees are submitted for parties appearing in the above entitled action as indicated below:

AARON M. MORGAN	$270.00
TOTAL REMITTED:	**$270.00**

DATED this 20 day of May, 2015.

RICHARD HARRIS LAW FIRM

ADAM W. WILLIAMS
Nevada Bar No. 13617
801 S. Fourth Street
Las Vegas, Nevada 89101
Attorneys for Plaintiff

EXHIBIT 2

EXHIBIT 2

DISTRICT COURT

CLARK COUNTY, NEVADA

CASE NO: A-15-718679-C

DEPT. NO: VII

AARON MORGAN,

Plaintiff,

vs.

DAVID LUJAN,

Defendant.

SPECIAL VERDICT

We, the jury in the above-entitled action, find the following special verdict on the questions submitted to us:

QUESTION NO. 1: Was Defendant negligent?

ANSWER: Yes ✓ No _____

If you answered no, stop here. Please sign and return this verdict.

If you answered yes, please answer question no. 2.

QUESTION NO.2: Was Plaintiff negligent?

ANSWER: Yes _____ No ✓

If you answered yes, please answer question no. 3.

If you answered no, please skip to question no. 4.

///

A-15-718679-C
SJV
Special Jury Verdict
4738215

H000815

2

QUESTION NO. 3: What percentage of fault do you assign to each party?

Defendant: 100

Plaintiff: 0

Total: 100%

Please answer question 4 without regard to you answer to question 3.

QUESTION NO. 4: What amount do you assess as the total amount of Plaintiff's damages? (Please do not reduce damages based on your answer to question 3, if you answered question 3. The Court will perform this task.)

Past Medical Expenses	$ 208,480.00
Future Medical Expenses	$ 1,156,500.00
Past Pain and Suffering	$ 116,000.00
Future Pain and Suffering	$ 1,500,000.00
TOTAL	$ 2,980,980.00

DATED this 9th day of April, 2018.

Arthur J. St. Laurent

FOREPERSON

ARTHUR J. ST. LAURENT

H000816

EXHIBIT 3

EXHIBIT 3

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Attorneys for Plaintiff, Aaron M. Morgan

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DISTRICT COURT

CLARK COUNTY, NEVADA

AARON M. MORGAN, individually, Plaintiff, vs. DAVID E. LUJAN, individually; HARVEST MANAGEMENT SUB LLC; a Foreign Limited-Liability Company; DOES 1 through 20; ROE BUSINESS ENTITIES 1 through 20, inclusive jointly and severally, Defendants.	Case No.: A-15-718679-C Dept. No.: XI

PLAINTIFF'S MOTION FOR ENTRY OF JUDGMENT

Plaintiff, Aaron M. Morgan, in this matter, by and through his attorneys of record, Benjamin P. Cloward, Esq. and Bryan A. Boyack, Esq., of the Richard Harris Law Firm, and Micah S. Echols, Esq. and Tom W. Stewart, Esq., of Marquis Aurbach Coffing, hereby files Plaintiff's Motion for Entry of Judgment. This motion is made and based on the papers and

pleadings on file herein, the attached memorandum of points and authorities, and the oral argument before the Court.

NOTICE OF MOTION

You and each of you, will please take notice that **PLAINTIFF'S MOTION FOR ENTRY OF JUDGMENT** will come on regularly for hearing on the 04 day of Sept., 2018 at the hour of 9:00 A.m. or as soon thereafter as counsel may be heard, in Department 11 in the above-referenced Court.

Dated this ___ day of July, 2018.

MARQUIS AURBACH COFFING

By_____
Micah S. Echols, Esq.
Nevada Bar No. 8437
Tom W. Stewart, Esq.
Nevada Bar No. 14280
10001 Park Run Drive
Las Vegas, Nevada 89145
Attorneys for Plaintiff, Aaron M. Morgan

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

On April 9, 2018, a Clark County jury rendered judgment in favor of Plaintiff, Aaron Morgan ("Morgan"), and against Defendants, David Lujan ("Lujan") and Harvest Management Sub LLC ("Harvest Management"), in the amount of $2,980,980.00, plus pre- and post-judgment interest.[1] It was undisputed during trial that Lujan was acting within the course and scope of his employment with Harvest Management at the time of the traffic accident at the center of the case. All evidence and testimony indicated Morgan sought relief from, and that judgment would be entered against, both Defendants. However, the special verdict form prepared by the Court (the "special verdict form") inadvertently omitted Harvest Management from the caption, despite Harvest Management being listed on the pleadings and jury instructions upon which the jury

[1] *See* Special Verdict, attached as **Exhibit 1**.

relied when reaching the verdict itself. The Court acknowledged this omission, and Defendants conceded they had no objection to it. Accordingly, Morgan respectfully requests this Court enter judgment against both Defendants, in accordance with the jury instructions, pleadings, testimony, and evidence, either by (a) simply entering the proposed judgment attached hereto or, (b) by making an explicit finding that the judgment was rendered against both Defendants pursuant to NRCP 49(a) and then entering judgment accordingly.[2]

II. FACTUAL BACKGROUND

On April 1, 2014, Morgan was driving his Ford Mustang north on McLeod Drive in the right lane. Morgan approached the intersection with Tompkins Avenue. At that time, Lujan, who was driving a shuttle bus owned by Harvest Management, entered the intersection driving east from the Paradise Park driveway, and attempted to cross McLeod Drive heading east on Tompkins Avenue. The front of Morgan's car struck the side of Defendants' bus in a major collision resulting in total loss of Morgan's vehicle and serious bodily injuries. Morgan was transported from the scene of the accident to Sunrise Hospital. The emergency room physicians focused on potential head trauma and injuries to the cervical spine and to Morgan's wrists. Morgan was eventually discharged with instructions to follow up with a primary care physician. A week later, Morgan sought treatment for pain in his neck, lower-back, and both wrists.

Over the next two years, Morgan underwent a series of treatments and procedures for his injuries—including bilateral medial branch block injections to his thoracic spine; injections to ease the pain from his bilateral triangular fibrocartilage tears; left wrist arthroscope and triangular fibrocartilage tendon repair with debridement, incurring approximately nearly $264,281.00 in medical expenses.

III. PROCEDURAL HISTORY

On May 5, 2015, Morgan filed a complaint for negligence and negligence per se against Lujan and vicarious liability against Harvest Management. In jointly answering the complaint, both Defendants were represented by the same counsel and both named in the caption.

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[2] *See* proposed Judgment Upon the Jury Verdict, attached as **Exhibit 2**.

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After a lengthy discovery period, the case initially proceeded to trial in early November, 2017. During the initial trial, Lujan testified that he was employed by Montara Meadows, a local entity under the purview of Harvest Management:

> [Morgan's counsel]: All right. Mr. Lujan, at the time of the accident in April of 2014, were you employed with Montara Meadows?
>
> [Lujan]: Yes.
>
> [Morgan's counsel]: And what was your employment?
>
> [Lujan]: I was the bus driver.
>
> [Morgan's counsel]: Okay. And what is your understanding of the relationship of Montara Meadows to Harvest Management?
>
> [Lujan]: Harvest Management was our corporate office.
>
> [Morgan's counsel]: Okay.
>
> [Lujan]: Montara Meadows is just the local --
>
> [Morgan's counsel]: Okay. All right. And this accident happened April 1, 2014, correct?
>
> [Lujan]: Yes, sir.[3]

However, on the third day of the initial trial, the Court declared a mistrial based on Defendants' counsel's misconduct.[4]

Following the mistrial, the case proceeded to a second trial the following April. Vicarious liability was not contested during trial. Instead, Harvest Management's NRCP 30(b)(6) representative contested primary liability—the representative claimed that either Morgan or an unknown third party was primarily responsible for the accident—but did not contest Harvest Management's own vicarious liability.[5]

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[3] Transcript of Jury Trial, November 8, 2017, attached as **Exhibit 3**, at 109 (direct examination of Lujan).

[4] *See* **Exhibit 3** at 166 (the Court granting Plaintiff's motion for mistrial); *see also* Court Minutes, November 8, 2017, attached as **Exhibit 4**.

[5] *See* Transcript of Jury Trial, April 5, 2018, attached as **Exhibit 5**, at 165–78 (testimony of Erica Janssen, NRCP 30(b)(6) witness for Harvest Management); Transcript of Jury Trial, April 6, 2018, attached as **Exhibit 6**, at 4–15 (same).

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On the final day of trial, the Court *sua sponte* created a special verdict form that inadvertently included Lujan as the only Defendant in the caption. The 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.
>
> [Defendants' 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.

At the end of the six-day jury trial, jury instructions were provided to the jury with the proper caption.[6] The jury used those instructions to fill-out the improperly-captioned special verdict form and render judgment in favor of Plaintiff—the jury found Defendants to be negligent and 100% at fault for the accident.[7] As a result, the jury awarded Plaintiff $2,980,000.[8]

IV. LEGAL ARGUMENT

This Court should enter the proposed Judgment on the Jury Verdict attached as **Exhibit 2**—it provides that judgment was rendered against both Lujan and Harvest Management because such a result conforms to the pleadings, evidence, and jury instructions upon which the jury relied in reaching the special verdict.

In the alternative, the Court should make an explicit finding pursuant to NRCP 49(a) that the special verdict was rendered against both Defendants and then enter judgment accordingly. NRCP 49(a) provides, in certain circumstances, the Court may make a finding on an issue not raised before a special verdict was rendered. Indeed, when a special verdict is used, "the court may submit to the jury written questions susceptible of categorical or other brief answer . . . which might properly be made under the pleadings and evidence." NRCP 49(a). Further, "[t]he court shall give to the jury such explanation and instruction concerning the matter

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[6] *See* Jury Instructions cover page, attached as **Exhibit** 7, at 1.

[7] *See* **Exhibit 1.**

[8] *Id.*

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thus submitted as may be necessary to enable the jury to make its findings upon each issue." *Id.* However, "[i]f in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives the right to a trial by jury of the issue so omitted unless before the jury retires the party demands its submission to the jury. *As to an issue omitted without such demand the court may make a finding*; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict." *Id.* (emphasis added).

Here, the record plainly supports judgment being rendered against both Defendants. However, should the Court wish to clarify the issue for the record, the Court should make an explicit finding that the omission of Harvest Management from the special verdict was inadvertent and, as a result, that judgment was rendered in favor of Morgan and both against Defendants, jointly and severally.

V. CONCLUSION

For the foregoing reasons, Plaintiff Aaron Morgan respectfully requests this Court enter the proposed Judgment on the Jury Verdict attached as **Exhibit 2**. In the alternative, Plaintiff requests this Court to make an explicit finding that judgment in this matter was rendered against both Defendants and then enter judgment accordingly.

Dated this 30th day of July, 2018.

MARQUIS AURBACH COFFING

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing **PLAINTIFF'S MOTION FOR ENTRY OF JUDGMENT** was submitted electronically for filing and/or service with the Eighth Judicial District Court on the 30th day of July, 2018. Electronic service of the foregoing document shall be made in accordance with the E-Service List as follows:[9]

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I further certify that I served a copy of this document by mailing a true and correct copy thereof, postage prepaid, addressed to:

N/A

/s/ Leah Dell
Leah Dell, an employee of
Marquis Aurbach Coffing

[9] Pursuant to EDCR 8.05(a), each party who submits an E-Filed document through the E-Filing System consents to electronic service in accordance with NRCP 5(b)(2)(D).

EXHIBIT 4

EXHIBIT 4

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DISTRICT COURT

CLARK COUNTY, NEVADA

AARON M. MORGAN, individually, Plaintiff, vs. DAVID E. LUJAN, individually; HARVEST MANAGEMENT SUB LLC; a Foreign-Limited-Liability Company; DOES 1 through 20; ROE BUSINESS ENTITIES 1 through 20, inclusive jointly and severally, Defendants.	Case No. A-15-718679-C Dept. No. XI **DEFENDANT HARVEST MANAGEMENT SUB LLC'S OPPOSITION TO PLAINTIFF'S MOTION FOR ENTRY OF JUDGMENT** Hearing Date: September 14, 2018 Hearing Time: In Chambers

Defendant Harvest Management Sub LLC ("Harvest"), hereby opposes the Motion for Entry of Judgment (the "Motion") filed by Plaintiff Aaron M. Morgan ("Mr. Morgan") on July 30, 2018.

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This Opposition is made and based on the following memorandum of points and authorities, the papers and pleadings on file, and any oral argument the Court may allow.[1]

DATED this 16th day of August, 2018.

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By: */s/ Dennis L. Kennedy*
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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

In the recent trial of this matter, Plaintiff Mr. Morgan wholly failed to pursue — and in fact appeared to have abandoned — the single claim (for negligent entrustment) that he asserted against Harvest, the former employer of the individual defendant, David E. Lujan ("Mr. Lujan"). In particular, Mr. Morgan failed to do any of the following at trial:

- He did not reference Harvest in his introductory remarks to the jury regarding the identity of the Parties and expected witnesses, (Ex. 10,[2] 17:2-24, 25:7-26:3);
- He did not mention Harvest or his claim against Harvest during jury voir dire, (*id.* at 33:2-93:22, 97:6-188:21, 191:7-268:12; Ex. 11,[3] at 3:24-65:7, 67:4-110:22);
- He did not reference Harvest or his claim against Harvest in his opening statement, (Ex. 11, at 126:7-145:17);
- He offered no evidence regarding any liability of Harvest for his damages;

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[1] The Motion is currently scheduled to be heard in chambers by the Court on September 14, 2018. Harvest respectfully requests that, if the Court finds it appropriate, the Motion be set for hearing so that the parties can be heard on this important issue.

[2] Excerpts of Recorder's Tr. of Hrg. Civil Jury Trial (Apr. 2, 2018) are attached as Exhibit 10, at Vol. III of App. at H000384-H000619.

[3] Excerpts of Recorder's Tr. of Hrg. Civil Jury Trial (Apr. 3, 2018) are attached as Exhibit 11, at Vol. IV of App. at H000620-H000748.

- He did not elicit any testimony from any witness that could have supported his claim against Harvest;
- He did not reference Harvest or his claim against Harvest in his closing argument or rebuttal closing argument, (Ex. 12,[4] at 121:4-136:19, 157:13-161:10);
- He did not include his claim against Harvest in the jury instructions, (Ex. 13[5]); and
- He did not include Harvest in the Special Verdict Form, never asked the jury to assess liability against Harvest, and, in fact, gave the jury no option to find Harvest liable for anything, (Mot. at Ex. 1).

Now, having obtained a verdict in excess of $3 million (when interest is considered) against Mr. Lujan, and perhaps regretting his trial strategy, Mr. Morgan asks the Court to "fix" the jury's verdict and enter judgment against Harvest. Mr. Morgan attempts to classify the verdict form as merely an inadvertent clerical error that easily can be corrected by this Court. To the contrary, assessing liability against Harvest would require that this Court ignore the record and impose liability where none has been proven to exist, supplanting the jury's verdict with its own determination. Essentially, Mr. Morgan requests that the Court engage in reversible error by determining the ultimate liability of a party — rather than an issue of fact, as contemplated by Nevada Rule of Civil Procedure 49(a). Thus, Mr. Morgan's Motion must be denied.

Alarmingly, Mr. Morgan's Motion is based on multiple half-truths and blatant misrepresentations. For example, Mr. Morgan asserts — without a single citation to supporting evidence in the record (***because there is none***) — that (1) the issue of whether Mr. Lujan was acting within the course and scope of his employment at the time of the accident was "undisputed," (Mot. at 2:21-23); (2) the issue of vicarious liability was uncontested by Harvest, (*id.* at 4:21-22); and (3) "the record plainly supports" a judgment against both Mr. Lujan and Harvest, (*id.* at 6:7). The record, however, demonstrates the complete opposite.

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[4] Excerpts of Recorder's Tr. of Hrg. Civil Jury Trial (Apr. 9, 2018) are attached hereto as Exhibit 12, at Vol. IV of App. at H000749-H000774.

[5] A true and correct copy of the Jury Instructions (Apr. 9, 2018) are attached as Exhibit 13, at Vol. IV of App. at H000775-H000814.

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First, in his Complaint, Mr. Morgan pled a claim for negligent entrustment, not vicarious liability, and Harvest denied these allegations in its Answer. (Ex. 1,[6] at ¶¶ 15-22; Ex. 2,[7] at 2:8-9, 3:9-10.) Far from being undisputed or uncontested, ***Harvest squarely denied liability***. Thereafter, Mr. Morgan took no steps at trial to satisfy his burden of proof as to either negligent entrustment or vicarious liability. He developed no testimony and offered no evidence even suggesting that Mr. Lujan was acting within the course and scope of his employment with Harvest at the time of the accident. Nor did he develop any testimony or offer any evidence suggesting that Mr. Lujan was an inexperienced, incompetent, or reckless driver prior to the accident, or that Harvest knew or should have known of such (alleged) driving history. More importantly, Mr. Morgan failed to rebut the evidence offered by Mr. Lujan and Harvest which proved that Harvest could not be liable for either vicarious liability or negligent entrustment — specifically, Mr. Lujan's testimony that he was on a lunch break when the accident occurred and that he had never been in an accident before.

Given the lack of *any* evidence offered at trial against Harvest, there is no legal basis for entry of judgment against Harvest. Mr. Morgan's Motion — characterizing the verdict as a simple mistake — borders on dishonesty. Therefore, Harvest respectfully requests that Mr. Morgan's Motion be denied in its entirety and that a judgment be entered consistent with the jury's verdict — solely against Mr. Lujan.

II. RELEVANT FACTS AND PROCEDURAL HISTORY

A. The Pleadings.

On May 20, 2015, Mr. Morgan filed a Complaint against Mr. Lujan and Harvest. (*See generally* Ex. 1.) The only claim alleged against Harvest in the Complaint is captioned "Vicarious Liability/Respondeat Superior," but the allegations of the claim are more akin to a claim for ***negligent entrustment***. (*Id.* at ¶¶ 15-22 (alleging that Harvest negligently entrusted the vehicle to Mr. Lujan despite the fact that it knew or should have known that Mr. Lujan was an incompetent, inexperienced, or reckless driver).)

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[6] A true and correct copy of the Complaint (May 20, 2015) is attached as Exhibit 1, at Vol. I of App. at H000001-H000006.

[7] A true and correct copy of Defs.'Answer to Pl.'s Compl. (June 16, 2015) is attached as Exhibit 2, at Vol. I of App. at H000007-H000013.

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Despite the title of the claim, the third cause of action fails to allege that Mr. Lujan was acting within the course and scope of his employment at the time of the accident. (*Id.*) Rather, the only reference to "course and scope" in the entire Complaint is as follows:

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

(*Id.* at ¶ 9 (emphasis added).)

On June 16, 2015, Mr. Lujan and Harvest filed Defendants' Answer to Plaintiff's Complaint.[8] (*See generally* Ex. 2.) The Defendants denied Paragraph 9 of the Complaint, including its implied allegation that Mr. Lujan was acting within the course and scope of his employment at the time of the accident. (Ex. 1, at ¶ 9; Ex. 2, at 2:8-9.) Harvest admitted that it employed Mr. Lujan as a driver, that it owned the vehicle involved in the accident, and that it had entrusted control of the vehicle to Mr. Lujan. (Ex. 1, at ¶¶ 16-18; Ex. 2, at 3:7-8.) However, Harvest denied that: (i) Mr. Lujan was incompetent, inexperienced, or reckless in the operation of the vehicle; (ii) it knew or should have known that he was incompetent, inexperienced, or reckless in the operation of motor vehicles; (iii) Mr. Morgan was injured as a proximate consequence of Harvest's alleged negligent entrustment of the vehicle to Mr. Lujan; and (iv) Mr. Morgan suffered damages as a direct and proximate result of Harvest's alleged negligent entrustment of the vehicle to Mr. Lujan. (Ex. 1, at ¶¶ 19-22; Ex. 2, at 3:9-10.) Harvest's and Mr. Lujan's Answer also included an affirmative defense of comparative liability. (Ex. 2, at 3:16-21.)[9]

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[8] Mr. Morgan's Motion emphasizes that Mr. Lujan and Harvest were represented by the same counsel. (Mot. at 3:25-26.) This fact is irrelevant. Liability cannot be imputed to Harvest simply because it shared counsel with its employee. Mr. Morgan still bore the burden of proving his claims against both defendants.

[9] Harvest's and Mr. Lujan's Answer was admitted into evidence during the second trial, as Exhibit 26. (Excerpts of Recorder's Tr. of Hrg. Civil Jury Trial (Apr. 5, 2018), attached hereto as Exhibit 3, at Vol. I of App. at H000014-H000029, at 169:25-170:17.)

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B. Discovery.

On April 14, 2016, Mr. Morgan propounded interrogatories on Harvest.[10] (*See generally* Ex. 4.[11]) The interrogatories included a request regarding the background checks Harvest performed prior to hiring Mr. Lujan, (*id.* at 6:25-7:2), and a request regarding any disciplinary actions Harvest had taken against Mr. Lujan in the five years preceding the accident which related to Mr. Lujan's operation of a Harvest vehicle, (*id.* at 7:15-19). There were no interrogatories propounded upon Harvest which concerned whether Mr. Lujan was acting within the course and scope of his employment at the time of the accident. (*See generally* Ex. 4.)

On October 12, 2016, Harvest served its Responses to Mr. Morgan's Interrogatories. (*See generally* Ex. 5.[12]) Harvest answered Interrogatory No. 5, regarding the pre-hiring background checks relating to Mr. Lujan, as follows:

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

(*Id.* at 3:2-19 (emphasis added).) Further, in response to Interrogatory No. 8, regarding past disciplinary actions taken against Mr. Lujan, Harvest's response was "***None***." (*Id.* at 4:17-23 (emphasis added).)[13]

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[10] Mr. Morgan also propounded interrogatories on Mr. Lujan, but Mr. Lujan failed to serve any responses. Mr. Morgan never moved to compel Mr. Lujan to answer the interrogatories and never deposed Mr. Lujan.

[11] A true and correct copy of Pl.'s First Set of Interrogs. to Def. Harvest Mgmt. Sub LLC (Apr. 14, 2016) is attached as Exhibit 4, at Vol. 1 of App. at H000030-H000038.

[12] A true and correct copy of Def. Harvest Mgmt. Sub, LLC's Resps. to Pl.'s First Set of Interrogs. (Oct. 12, 2016) is attached as Exhibit 5, at Vol. I of App. at H000039-H000046.

[13] Portions of Harvest's Responses to Mr. Morgan's Interrogatories were read to the jury during the second trial, (Excerpts of Recorder's Tr. of Hrg. Civil Jury Trial (Apr. 6, 2018), attached hereto as Exhibit 6, at Vol. I of App. at H000047-H000068, at 10:22-13:12).

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

C. The First Trial.

This case was first tried to a jury on November 6, 2017 through November 8, 2017. (*See generally* Ex. 7[14]; Ex. 8.[15]) At the start of the first trial, when the Court asked the prospective jurors if they knew any of the Parties or their counsel, the Court asked about Mr. Morgan, Plaintiff's counsel, Mr. Lujan, and defense counsel. (Ex. 7, at 36:24-37:25.) No mention was made of Harvest, and no objection was raised by Mr. Morgan. (*Id.*) Further, when the Court asked counsel to name their witnesses to determine if the prospective jurors were familiar with any witnesses, no officer, director, employee, or other representative of Harvest was named as a potential witness. (*Id.* at 41:1-21.)

Mr. Morgan also never referenced Harvest, his express claim for negligent entrustment, or his attempted claim for vicarious liability during voir dire or his opening statement. (*Id.* at 45:25-121:20, 124:13-316:24; Ex. 9,[16] at 6:4-29:1.) In fact, Harvest was not mentioned until the third day of the first trial, while Mr. Lujan was on the witness stand. Mr. Lujan's relevant testimony is as follows:

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

(Ex. 8, at 108:23-109:8.)

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[14] Excerpts of Tr. of Jury Trial (Nov. 6, 2017) are attached as Exhibit 7, at Vol. II of App. at H000069-H000344.

[15] Excerpts of Tr. of Jury Trial (Nov. 8, 2017) are attached as Exhibit 8, at Vol. III of App. at H000345-H000357.

[16] Excerpts of Tr. of Jury Trial (Nov. 7, 2017) are attached as Exhibit 9, at Vol. III of App. at H000358-H000383.

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Mr. Lujan also provided the only evidence during trial which was relevant to claims of either negligent entrustment or vicarious liability:

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

(*Id.* at 111:16-24 (emphasis added).)

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

(*Id.* at 112:8-10 (emphasis added).)

After counsel for Mr. Morgan completed his examination of Mr. Lujan, the court permitted the jury to submit its own questions. A juror — not Mr. Morgan — asked Mr. Lujan:

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

(*Id.* at 131:21-24, 132:18, 132:22-133:2 (emphasis added).)

Later that day, the first trial ended prematurely as a result of a mistrial, when defense counsel inquired about a pending DUI charge against Mr. Morgan. (*Id.* at 150:15-152:14, 166:12-18.)

D. <u>The Second Trial.</u>

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

The second trial of this action commenced on April 2, 2018. (*See generally* Ex. 10.) The second trial was very similar to the first trial regarding the lack of reference to and the lack of evidence offered regarding Harvest. First, Harvest was not officially identified as a party when the court requested that counsel identify themselves and the Parties for the jury. In fact, counsel for the defense merely stated as follows:

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> MR. GARDNER: Hello everyone. What a way to start a Monday, right? In my firm we've got myself, Doug Gardner and then Brett South, who is not here, but this is Doug Rands, and then my client, Erica[17] is right back here. Let's see, I think that's it for me.

(*Id.* at 17:15-18.) Mr. Morgan did not object or inform the prospective jurors that the case also involved Harvest, or a corporate defendant, or even the employer of Mr. Lujan. (*Id.* at 17:19-24.)

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

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

(*Id.* at 25:6-14 (emphasis added).) Again, consistent with his approach in the first trial and throughout the remainder of this second trial, Mr. Morgan did not object or clarify that the case also involved a claim against Mr. Lujan's employer, Harvest. (*Id.* at 25:15-22.)

Finally, when the Court asked the Parties to identify the witnesses they planned to call during trial, no mention was made of any officer, director, employee, or other representative of Harvest — not even the representative, Erica Janssen, who was attending trial. (*Id.* at 25:15-26:3.)

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

Just as with the first trial, Mr. Morgan failed to reference Harvest or his claim for negligent entrustment/vicarious liability during voir dire. (*Id.* at 33:2-93:22, 97:6-188:21, 191:7-268:12; Ex. 11, at 3:24-65:7, 67:4-110:22.) Moreover, during Mr. Morgan's opening statement, Plaintiff's counsel never made a single reference to Harvest, a corporate defendant, vicarious liability,

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[17] In the second trial, Mr. Lujan chose not to attend. Mr. Gardner's introduction referenced Erica Janssen, a representative of Harvest.

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negligent entrustment, or even the fact that there were two defendants in the action. (Ex. 11, at 126:7-145:17.) Plaintiff's counsel merely stated:

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

(*Id.* at 126:15-25.) Plaintiff's counsel made no reference to any evidence to be presented during the trial which would demonstrate that Mr. Lujan was acting in the course and scope of his employment at the time of the accident or that Harvest negligently entrusted the vehicle to Mr. Lujan. (*Id.* at 126:7-145:17.)

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

On the fourth day of the second trial, Mr. Morgan called Erica Janssen, the Rule 30(b)(6) representative of Harvest, as a witness during his case in chief. (Ex. 3, at 164:13-23.) Ms. Janssen confirmed that it was Harvest's understanding that Mr. Lujan had been at a park in a shuttlebus having lunch and that the accident occurred as he exited the park:

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

(*Id.* at 168:15-23 (emphasis added).)

Mr. Morgan never asked Ms. Janssen where she was employed, her title, whether Harvest employed Mr. Lujan, what Mr. Lujan's duties were, or any other questions that might have elicited evidence to support a claim for negligent entrustment or vicarious liability. (*Id.* at 164:21-177:17;

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Ex. 6, at 4:2-6:1.) In fact, it wasn't until redirect examination that Mr. Morgan even referenced the fact that Ms. Janssen was in risk management for Harvest:

> [MR. CLOWARD:]
> Q: So where it says, on interrogatory number 14, and you can follow along with me:
>
> > "Please provide the full name of the person answering the interrogatories on behalf of the Defendant, Harvest Management Sub, LLC, and state in what capacity your [*sic*] are authorized to respond on behalf of said Defendant.
> > "A. Erica Janssen, Holiday Retirement, Risk Management."
>
> A: Yes.

(Ex. 6, at 11:18-25.) Other than this acknowledgement that Ms. Janssen executed interrogatory responses on behalf of Harvest, Mr. Morgan, again, failed to elicit any evidence on redirect examination to support a claim for negligent entrustment or vicarious liability. (*Id.* at 9:23-12:6, 13:16-15:6.)

On the fifth day of the second trial, Mr. Morgan rested his case (*id.* at 55:6-7), again, with no evidence presented to support a claim for vicarious liability or negligent entrustment — i.e., evidence of Mr. Lujan's driving history; Harvest's knowledge of Mr. Lujan's driving history; disciplinary actions Harvest took against Mr. Lujan prior to the accident; background checks Harvest performed on Mr. Lujan; alcohol and drug testing Harvest performed on Mr. Lujan; Mr. Lujan's job duties; Harvest's policy regarding the use of company vehicles to drive to and from lunch; whether Mr. Lujan was required to clock-in and clock-out during his shifts; or whether any residents of the retirement home were passengers on the bus at the time of the accident, among other facts.[18]

During the defense's case in chief — not Mr. Morgan's — defense counsel read portions of Mr. Lujan's testimony from the first trial into the record. (*Id.* at 195:7-203:12.) As referenced above, this testimony included that: (1) Mr. Lujan worked as a bus driver for Montara Meadows at the time of the accident; (2) Harvest was the "corporate office" for Montara Meadows; (3) the

[18] It should be noted that despite the lack of evidence on these issues, Plaintiff's counsel stated, during his closing argument, that there were no passengers on the bus at the time of the accident. (Ex. 12, at 124:15-17) ("That this company transporting our elderly members of the community is going to follow the rules of the road. ***Aren't we lucky that there weren't other people on the bus?*** Aren't we lucky?") (emphasis added)).

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accident occurred when Mr. Lujan was leaving Paradise Park; and (4) Mr. Lujan had never been in an "accident like that" or an accident in a bus before. (*Id.* at 195:8-17, 195:25-196:10, 196:19-24, 197:8-10.)

This testimony, coupled with Ms. Janssen's testimony that Mr. Lujan was on his lunch break at the time of the accident, is the complete universe of evidence offered at the second trial that even tangentially concerns Harvest.

4. There Are No Jury Instructions Pertaining to the Claim Against Harvest.

As Mr. Morgan points out in his Motion, the jury instructions provided to the jury included the correct caption for this action and listed both Mr. Lujan and Harvest as defendants. (Ex. 13, at 1:6-12.) However, Mr. Morgan fails to disclose in his Motion that neither party submitted any jury instructions ***pertaining to vicarious liability, actions within the course and scope of employment, negligent entrustment, or corporate liability***. (*See generally* Ex. 13.)

Again, this is entirely consistent with Mr. Morgan's trial strategy. He all but ignored Harvest throughout the trial process.

5. Mr. Morgan Failed to Include Harvest in the Special Verdict Form.

On the last day of trial, before commencing testimony for that day, the Court provided the Parties with a sample jury form that the Court had used in its last car accident trial.

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

(Ex. 12, at 5:20-6:1 (emphasis added).) Later that same day, after the defense rested its case, Plaintiff's counsel informed the Court that it only wanted to make one change to the special verdict form that the Court had proposed:

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

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

(*Id.* at 116:11-23 (emphasis added).) The Special Verdict Form approved by Mr. Morgan — after his edits were accepted and incorporated by the Court — makes no mention of Harvest (which is entirely consistent with Mr. Morgan's trial strategy).

Mr. Morgan asserts that the Special Verdict form simply "inadvertently omitted Harvest Management from the caption." (Mot. at 2:24-25.) This is disingenuous. Not only does the caption list Mr. Lujan as the sole defendant, (*id.* at Ex. 1, at 1:6-12), but:

- The Special Verdict form only asked the jury to determine whether the "***Defendant***" was negligent, (*id.* at 1:17 (emphasis added));
- The Special Verdict form did not ask the jury to find Harvest liable for anything, (*id.*);
- The Special Verdict form directed the jury to apportion fault only between "***Defendant***" and Plaintiff, with the percentage of fault totaling 100 percent, (*id.* at 2:1-4 (emphasis added));
and
- Mr. Morgan never objected to the failure to apportion fault between Plaintiff and the ***two*** defendants, as is required by NRS 41.141, (*id.*).

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

Finally, in closing arguments, Plaintiff's counsel never even mentioned Harvest or Mr. Morgan's claim for negligent entrustment or vicarious liability. (Ex. 12, at 121:5-136:19.) Plaintiff's counsel merely made references to the testimony of Erica Janssen and the fact that she: (1) contested liability; (2) blamed Mr. Morgan for the accident; (3) blamed an unknown third party for the accident; and (4) was unaware that Mr. Lujan had previously testified that Mr. Morgan had done nothing wrong and was not to blame for the accident. (*Id.* at 122:10-123:5.)

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Further, and perhaps the clearest example of the impropriety of Mr. Morgan's Motion, Plaintiff's counsel ***explained to the jury, in closing, how to fill out the Special Verdict form.*** His remarks on liability were ***limited exclusively to Mr. Lujan***:

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

(Id. at 124:20-125:6 (emphasis added).) Plaintiff's counsel also failed to mention Harvest or the claim alleged against Harvest in his rebuttal closing argument. (*Id.* at 157:13-161:10.)

III. LEGAL ARGUMENT

A. A Judgment Cannot Be Entered Against Harvest Because It Would Be Contrary to the Pleadings, Evidence, and Jury Instructions in This Case.

Mr. Morgan's primary argument in bringing this Motion is that the Court should enter judgment against Harvest "because such a result conforms to the pleadings, evidence, and jury instructions upon which the jury relied in reaching the special verdict." (Mot. at 5:14-17; *see also Id.* at 2:23-24, 6:7.) However, Mr. Morgan fails to cite to a single piece of evidence or even a jury instruction that would demonstrate that the jury intended to find Harvest liable for the claim alleged in the Complaint. Rather, Mr. Morgan makes unsupported assertions that the claim of vicarious liability was not contested at trial, (*id.* at 4:21-22), and that it was undisputed that Mr. Lujan was acting within the course and scope of his employment with Harvest at the time of the accident, (*id.* at 2:21-23).

The record establishes that Mr. Morgan failed to meet his burden of proof as to any claim he alleged (or attempted to allege) against Harvest. The record further establishes that Harvest cannot be liable for vicarious liability or negligent entrustment, as a matter of law, because Mr. Lujan was at

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lunch when the accident occurred and he has no prior history of reckless or negligent driving. Finally, the record establishes that Mr. Morgan — whether through carelessness, a strategic trial decision, or acceptance of the futility of his claim — completely ignored Harvest and Harvest's alleged liability at trial and chose to focus solely on Mr. Lujan's liability and the amount of his damages. Thus, there is no factual basis for entry of judgment against Harvest.

1. Mr. Morgan Failed to Prove That Harvest Was Vicariously Liable for Mr. Lujan Injuries or Liable for Negligent Entrustment.

Mr. Morgan asserts that the issue of vicarious liability was not contested. (Mot. at 4:21-22.) This is not true. Harvest contested liability for the only claim pled in the Complaint — negligent entrustment — and for the attempted claim of vicarious liability, by denying these allegations in its Answer. (Ex. 1, at ¶¶ 9, 19-22; Ex. 2, at 2:8-9, 3:9-10.) Thus, as the plaintiff, Mr. Morgan bore the burden of proving his claims against Harvest at trial. *Porter v. Sw. Christian Coll.*, 428 S.W.3d 377, 381 (Tex. App. 2014) ("A plaintiff pleading respondeat superior bears the burden of establishing that the employee acted within the course and scope of his employment."); *Montague v. AMN Healthcare, Inc.*, 168 Cal. Reptr. 3d 123, 126 (Cal. Ct. App. 2014) ("The plaintiff bears the burden of proving that the employee's tortious act was committed within the scope of his or her employment."); *Willis v. Manning*, 850 So. 2d 983, 987 (La. Ct. App. 2003) (recognizing that the plaintiff bears the burden of proof on a claim for negligent entrustment); *Dukes v. McGimsey*, 500 S.W.2d 448, 451 (Tenn. Ct. App. 1973) ("The plaintiff has the burden of proving negligent entrustment of an automobile.")

Not only did Mr. Morgan fail to prove his claim, but the evidence adduced at trial actually demonstrated that Harvest could not be liable for either vicarious liability or negligent entrustment. Specifically, the undisputed evidence offered at trial proved that Mr. Lujan was at lunch at the time of the accident and had never been in an accident before. (Ex. 3, at 168:15-23; Ex. 6, at 196:19-24, 197:8-10.) Such evidence prevents the imposition of a judgment against Harvest.

J&C Drilling Co. v. Salaiz, 866 S.W.2d 632 (Tex. App. 1993), is instructive on this issue:

> We reject appellees' contention that the issue of course and scope was not contested. Appellants' answer contained a general denial, which put in issue all of the allegations of

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> appellees' petition, including the allegation that Gonzalez was acting in the course and scope of his employment with J&C. Because appellees had the burden of proof on this issue, it was not necessary for appellants to present evidence negating course and scope in order to contest the issue. In any event, as is discussed below, evidence was presented that Gonzalez was on a personal errand at the time of the accident, refuting the allegation that he was acting in the course and scope of his employment.

(*Id.* at 635).

a. Mr. Morgan Did Not Prove a Claim for Vicarious Liability, and Based on the Sole Evidence Offered at Trial Which Relates to This Claim, No Judgment Can Be Entered Against Harvest.

While Mr. Morgan's Complaint states one claim for relief against Harvest entitled "Vicarious Liability/Respondeat Superior," the allegations contained therein do not actually reflect a theory of respondeat superior — i.e., that Mr. Lujan was acting within the course and scope of his employment with Harvest at the time of the accident. (*See* Ex. 1 at ¶¶ 15-22.) Rather, his claim was akin to a claim for negligent entrustment, alleging that: (1) Mr. Lujan was employed as a driver for Harvest; (2) Harvest entrusted him with the vehicle; (3) Mr. Lujan was an incompetent, inexperienced, and/or reckless driver; and (4) Harvest actually knew, or should have known, of Mr. Lujan's inexperience or incompetence. (*See id.*)

It is anticipated that Mr. Morgan will argue that one general allegation in his Complaint which references the course and scope of employment was sufficient to state a claim for respondeat superior. (*Id.* at ¶ 9.) Even assuming *arguendo* that Mr. Morgan alleged a claim for vicarious liability, he failed to prove this claim at trial. Vicarious liability and/or respondeat superior applies to an employer only 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, 1225-26, 925 P.2d 1175, 1179, 1180-81 (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 the very task assigned to him'") (quoting *Prell Hotel Corp. v. Antonacci*, 86 Nev. 390, 391, 469 P.2d 399, 400 (1970)).

Mr. Morgan failed to offer any evidence as to Mr. Lujan's status at the time of the accident. The *only* facts adduced at trial that are related to Mr. Lujan's employment were: (1) that Mr. Lujan

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was an employee of Montara Meadows (a bus driver); (2) that Mr. Lujan drove the bus to Paradise Park for a lunch break; (3) that the accident occurred as Mr. Lujan was exiting the park; and (3) that Harvest is the "corporate office" of Montara Meadows. (*See* Ex. 3, at 168:15-23; Ex. 6, at 195:8-17, 195:25-196:10.)

Mr. Morgan failed to establish whether Mr. Lujan was "on the clock" during his lunch break, whether Mr. Lujan had returned to work and was transporting passengers at the time of the accident, whether Mr. Lujan had to "clock in" after his lunch break, whether Mr. Lujan was permitted to use a company vehicle while on his lunch break, or whether Harvest Management even knew that Mr. Lujan was using a company vehicle during his lunch breaks. Without developing these facts, there is insufficient evidence, under Nevada law, to conclude that Mr. Lujan was acting in the course and scope of his employment at the time of the accident.

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Moreover, the evidence offered by Mr. Lujan and Harvest demonstrates that Harvest is not vicariously liable for Mr. Morgan's injuries. Nevada has adopted the "going and coming rule." Under this rule, "[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." *Molino v. Asher*, 96 Nev. 814, 817-18, 618 P.2d 878, 879-80 (1980); *see also Nat'l Convenience Stores, Inc. v. Fantauzzi*, 94 Nev. 655, 658, 584 P.2d 689, 691 (1978). The rule is premised upon the idea that the "'employment relationship is "suspended" from the time the employee leaves until he returns, or that in commuting, he is not rendering service to his employer.'" *Tryer v. Ojai Valley Sch.*, 12 Cal. Rptr. 2d 114, 116 (Cal. Ct. App. 1992) (quoting *Hinman v. Westinghouse Elec. Co.*, 471 P.2d 988, 990-91 (Cal. 1970)).

While the Nevada Supreme Court has not specifically addressed whether an employer is vicariously liable for an employee's actions during a lunch break, the express language of and policy behind the "going and coming rule" suggests that an employee is not acting within the course and scope of his employment when he commutes to and from lunch during a break from his employment. Moreover, other jurisdictions have routinely determined that employers ***are not liable for an employee's negligence during a lunch break***. *See e.g., Gant v. Dumas Glass & Mirror, Inc.*, 935 S.W. 2d 202, 212 (Tex. App. 1996) (holding that an employer was not liable under respondeat

superior when its employee rear-ended the plaintiff while driving back from his lunch break in a company vehicle because the test is not whether the employee is returning from his personal undertaking to "***possibly*** engage in work" but rather whether the employee ***has*** "returned to the zone of his employment" and engaged in the employer's business); *Richardson v. Glass*, 835 P.2d 835, 838 (N.M. 1992) (finding the employer was not vicariously liable for the employee's accident during his lunch break because there was no evidence of the employer's control over the employee at the time of the accident); *Gordon v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 411 So. 2d 1094, 1098 (La. Ct. App. 1982) ("Ordinarily, an employee who leaves his employer's premises and takes his noon hour meal at home or some other place of his own choosing is outside the course of his employment from the time he leaves the work premises until he returns.").

Because Mr. Morgan failed to offer any evidence proving that Mr. Lujan was acting within the course and scope of his employment at the time of the accident — and the only evidence regarding Mr. Lujan's actions at the time of the accident demonstrate that he was on a lunch break — as a matter of law, judgment cannot be entered against Harvest on a claim of vicarious liability.

b. Mr. Morgan Also Failed to Prove to the Jury That Harvest Is Liable for Negligent Entrustment.

While Mr. Morgan does not address the claim of negligent entrustment in his Motion, it bears noting that he likewise failed to prove that Harvest was liable for the ***sole claim actually alleged against it in the Complaint***. In Nevada, "a person who knowingly entrusts a vehicle to an inexperienced or incompetent person" may be found liable for damages resulting therefrom. *Zugel by Zugel v. Miller*, 100 Nev. 525, 527, 688 P.2d 310, 312 (1984). To establish negligent entrustment, a plaintiff must demonstrate: (1) that an entrustment actually occurred; and (2) that the entrustment was negligent. *Id.* at 528, 688 P.2d at 313.

It is true that Harvest conceded that Mr. Lujan was its employee and that it entrusted him with a vehicle — satisfying the first element of a negligent entrustment claim; however, the second element was contested and never proven to a jury. (Ex. 2, at 3:9-10.) Mr. Morgan offered no evidence of Harvest's negligence in entrusting Mr. Lujan with a company vehicle. He adduced no evidence that Mr. Lujan was an inexperienced or incompetent driver. In fact, the only evidence in

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the record relating to Mr. Lujan's driving history demonstrates that he has never been in an accident before. (*See* Ex. 6, at 196:19-24; 197:8-10).

Mr. Morgan also failed to offer any evidence regarding Harvest's knowledge of Mr. Lujan's driving history. This is likely because Harvest's interrogatory responses demonstrated early in the case that it thoroughly checked Mr. Lujan's background prior to hiring him, and Harvest's annual check of Mr. Lujan's motor vehicle record "always came back clear." (Ex. 5, at 3:2-19.)

Because Mr. Morgan failed to offer any evidence at trial that Mr. Morgan was an inexperienced or incompetent driver and that Harvest knew or should have known of his inexperience or incompetence, the record fails to support entry of a judgment against Harvest for negligent entrustment. In fact, the undisputed evidence offered by Mr. Lujan demonstrating that he has never been in an accident before precludes entry of judgment against Harvest for negligent entrustment.

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2. The Record Belies Mr. Morgan's Contention That He Proceeded to Verdict Against Harvest.

Further undermining his current position, the record conclusively establishes that Mr. Morgan made a conscious choice and/or strategic decision to abandon his claim against Harvest at trial. Mr. Morgan never mentioned Harvest during the introductory remarks to the jury in which the Parties and expected witnesses were introduced to the jury. (Ex. 10, at 17:2-24, 25:7-26:3.) Mr. Morgan never mentioned Harvest to the jury during voir dire or examined prospective jurors about their feelings regarding corporate liability, negligent entrustment, or vicarious liability. (*Id.* at 33:2-93:22, 97:6-188:21, 191:7-268:12; Ex. 11, at 3:24-65:7, 67:4-110:22.) Mr. Morgan never mentioned Harvest, vicarious liability, negligent entrustment, or even corporate liability in his opening statement. (Ex. 11, at 126:7-145:17.) Mr. Morgan never offered a single piece of evidence or elicited any testimony from any witness which would prove the elements of either vicarious liability or negligent entrustment. Mr. Morgan never mentioned Harvest, vicarious liability, negligent entrustment, or corporate liability in his closing argument or rebuttal closing argument. (Ex. 12, at 121:4-136:19, 157:13-161:10.) Mr. Morgan failed to include questions relating to Harvest's liability or the apportionment of fault to Harvest in the Special Verdict form, despite requesting revisions to

the damages question in the sample Special Verdict form proposed by the Court.[19] (Ex. 12, at 116:11-23; *see also* Mot. at Ex. 1.) Finally, Mr. Morgan failed to include a single jury instruction relating to vicarious liability, negligent entrustment, or corporate liability. (Ex. 13.)

For Mr. Morgan to claim that the omission of Harvest from the Special Verdict form was a mere oversight or clerical error to be corrected by the Court is completely disingenuous. Mr. Morgan employed the same strategy for litigating his claims in the first trial — he chose to focus solely on Mr. Lujan's liability for negligence. Harvest was not mentioned in the introductory remarks to the jurors, in voir dire, in opening statements, or in the examination of any witness. (Ex. 7, at 29:4-17, 36:24-37:25, 41:1-21, 45:25-121:20, 124:13-316:24; Ex. 9, at 6:4-29:1.) Thus, the record clearly demonstrates that Mr. Morgan abandoned his claim against Harvest — likely due to a lack of evidence.

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B. Mr. Morgan's Alternative Request That Judgment Be Entered Against Harvest Pursuant to N.R.C.P. 49(a) Is Contrary to the Law and Must Be Denied.

In the alternative, Mr. Morgan asks this Court to make an explicit finding, under Nevada Rule of Civil Procedure 49(a), that Harvest is jointly and severally liable for the jury's verdict against Mr. Lujan. (*See* Mot. at 5:18-6:11.) N.R.C.P. 49(a) permits a court to submit a special verdict form, or special interrogatories, to the jury. If a special verdict form is submitted to the jury and a particular "issue of fact raised by the pleadings or by the evidence" is omitted from the special verdict form, "each party waives the right to a trial by jury of the issue omitted unless, before the jury retires[,] the party demands its written submission to the jury." N.R.C.P. 49(a). If there are any omitted issues for which a demand was not made by a party, "the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict." *Id.* Thus, the Court is permitted to make findings on omitted ***factual issues*** in order to avoid "the hazard of the verdict remaining incomplete and indecisive where the jury did not decide

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[19] Mr. Morgan attempts to shift the blame to the Court for the Special Verdict form's omission of Harvest. (Mot. at 5:1-8.) While the Court did provide the Parties with a sample special verdict form that it had used in its most recent car accident case (completely unrelated to this action), the Court clearly expected counsel to apply the correct caption and make any other changes they wanted. (Ex. 12, at 5:20-6:1.) It is Mr. Morgan — not the Court — that is responsible for a special verdict form that pertains solely to Mr. Lujan.

every element of recovery or defense." 33 Fed. Proc., L. Ed. § 44:326, Omitted Issue—Substitute Finding By Court (June 2018).[20] However, N.R.C.P 49(a) does not permit the Court to decide the ultimate issue of liability or to enter judgment where there is a complete lack of evidence to support a judgment.

This Court need not look any further than *Kinnel v. Mid-Atlantic Mausoleums, Inc.*, 850 F.2d 958 (3rd Cir. 1988), to determine that Mr. Morgan's request is beyond the power of this Court and completely contrary to clearly established case law. In *Kinnel*, the plaintiff brought claims against two defendants — a corporate entity (Mid-Atlantic Mausoleum, Inc.) and an individual (Kennan) — on the same claims for relief. *Id.* at 959. The court bifurcated the trial as to liability and damages. *Id.* During the trial on liability, the court submitted written interrogatories to the jury. *Id.* However, the written interrogatories failed to include any questions regarding Kennan's individual liability. *Id.* Thus, when the jury returned its verdict, it only found liability as to Mid-Atlantic Mausoleum. *Id.* Nonetheless, the district court entered judgment against both defendants in its order and the jury later determined damages against both defendants. *Id.* at 959-60.

On appeal, the Third Circuit reversed, finding that the district court erred in entering judgment against Kennan *even though the claims against the defendants were indistinguishable and the jury subsequently determined damages against both defendants*. *Id.* at 960. In reversing the trial court's entry of liability against Kennan, the Third Circuit drew a distinction between a court supplying an omitted subsidiary finding (as intended by the rule) and a court supplanting the jury to determine the ultimate liability of a party (which was never intended by the rule):

> Rule 49(a) as we understand it, was designed to have the court supply an omitted subsidiary finding which would complete the jury's determination or verdict. For example, although we recognize that in this case no individual elements of a misrepresentation cause of action were specifically framed for the jury to answer, nevertheless, the district court could 'fill in' those subsidiary elements when the jury returned a verdict finding that Mid-Atlantic had misrepresented commission rates to Kinnel. Subsumed within that ultimate jury findings were the five elements of misrepresentation, i.e., materiality,

[20] As the Nevada Rules of Civil Procedure are closely based on the Federal Rules of Civil Procedure, Nevada courts consider federal cases interpreting the rules as strong persuasive authority. *Exec. Mgmt., Ltd. v. Ticor Title Ins. Co.*, 118 Nev. 46, 53, 38 P.2d 872, 876 (2002); *Las Vegas Novelty, Inc. v. Fernandez*, 106 Nev. 113, 119, 787 P.2d 772, 776 (1990).

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> deception, intent, reasonable reliance and damages, each of which could be deemed to have been supplied by the court in accordance with the jury's judgment once the jury's ultimate verdict was known.
>
> ***That procedure of supplying a finding subsidiary to the ultimate verdict is a far cry, however, from a procedure whereby the court in the absence of a jury verdict, determines the ultimate liability of a party, as it did here. We have been directed to no authority which would permit the district court to act as it did here in depriving Kennan of his right to a jury verdict.***

Id. at 965-66 (emphasis added). In refusing to make a finding as to the ultimate liability to the individual defendant, the Court declined to "'***enter the minds of the jurors to answer a question that was never posed to them . . .***'" *Id.* at 967 (emphasis added) (quoting *Stradley v. Cortez*, 518 F.2d 488, 490 (3rd Cir. 1975)).[21]

Despite the fact that Rule 49(a) only applies to factual findings, and ultimate liability cannot be entered by a court under Rule 49(a),[22] Mr. Morgan now invites reversible error by asking this

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[21] *Stradley* addressed a somewhat similar issue of an "omitted verdict." In *Stradley*, the complaint named two individual defendants, Frederick Cortez, Sr. and Frederick Cortez, Jr. 518 F.2d at 489. When the deputy clerk asked the jury foreman about the verdict, the clerk only inquired if the jury found the *defendant* liable, and the clerk announced that the jury had found *Cortez, Jr.* liable for the plaintiff's injuries. *Id.* at 489-90. The jury foreman confirmed this verdict. *Id.* at 490. Four years after the judgment was entered, the plaintiff moved to change the docket and enter judgment against both defendants, claiming that the deputy clerk's examination of the jury foreman was the only reason the judgment was not entered against both defendants. *Id.* The district court denied the plaintiff's motion, refusing to treat the judgment as a "clerical error." *Id.* The Third Circuit upheld that decision. *Id.* The Court held:

> We believe that the jury/clerk colloquy, the verdict, and the entry of judgment set out in Stradley's motion, if anything, supports the defendant's position rather than Stradley's. We cannot at this late stage overturn what appears to be ***a verdict consistent with the evidence presented*** on plaintiff's ***mere allegation that the jury intended to do other than it did*** when it returned a verdict solely against Cortez, Jr. Stradley's claim that the jury never exonerated Senior and never indicated that its findings of liability should relate only to Junior are not borne out by the verdict, the judgment, or the record at trial.
>
> We have ***reviewed the record*** of the 1970 trial and have found ***no evidence that, at the time of the accident, Cortez, Jr. was acting as the agent of or under the control of his father.*** While the defendants were not present or represented at trial, ***their answer, specifically denying agency***, was still of record. ***It was incumbent upon plaintiff to offer some evidence to prove the alleged agency relationship.***

Id. at 495 (emphasis added).

[22] *See Williams v. Nat'l R.R. Passenger Corp.*, No. 90-5394, 1992 WL 230148 (E.D. Penn. Sept. 8, 1992) (refusing to determine individual recovery by each plaintiff, under Rule 49(a), because the three plaintiffs were treated jointly, and interchangeably, as the "plaintiff" throughout the case); *Jarvis v. Ford Motor Co.*, 283 F.3d 33, 56 (2002) (holding that Rule 49(a) does not apply where "the jury is required to make determinations not only of issues of fact but of ultimate liability").

Court to do exactly what *Kinnel* held it cannot: to enter judgment against Harvest. The jury never rendered such a verdict and the record fails to support entry of such a verdict.

C. Mr. Morgan's Failure to Request Apportionment of Damages Between the Defendants Dooms His Current Request that Judgment Be Entered Against Harvest.

Finally, even assuming *arguendo* Mr. Morgan had proved a claim of negligent entrustment or vicarious liability against Harvest (which he did not), and the Court had the power to add Harvest to the jury's verdict under Rule 49(a) (which it does not), it still would be impossible to enter judgment against Harvest in this case because Mr. Morgan failed to have the jury determine how to apportion liability between the defendants. Specifically, Mr. Morgan asks this Court to find that Harvest is jointly and severally liable for Mr. Lujan's conduct, (*see* Mot. at 6:7-11), despite the fact that Nevada abolished joint and several liability in cases against multiple, negligent tortfeasors over thirty years ago. *See Warmbrodt v. Blanchard*, 100 Nev. 703, 707-08, 692 P.2d 1282, 1285-86 (1984) (explaining that NRS 41.141 "eliminat[ed]" and "abolished" two common-law doctrines: (1) a plaintiff's contributory negligence as a complete bar to recovery; and (2) joint and several liability against negligent defendants), *superseded by statute on other grounds as stated in Countrywide Home Loans v. Thitchener*, 124 Nev. 725, 740-43 & n.39, 192 P.3d 243, 253-55 & n.39 (2008).

The law requires that "[i]n any action to recover damages for death or injury . . . in which comparative negligence is asserted as a defense [and] the jury determines the plaintiff is entitled to recover [damages], [the jury] shall return . . . [a] special verdict indicating the percentage of negligence attributable to each party remaining in the action."[23] NRS 41.141(1), (2)(b)(2). If a plaintiff is entitled to recover against more than one defendant, then "***each defendant is severally liable to the plaintiff only for that portion of the judgment which represents the percentage of negligence attributable to that defendant.***"[24] NRS 41.141(4) (emphasis added). By way of

[23] The jury does not need to find that the plaintiff was comparatively negligent to trigger the application of NRS 41.141; it is enough that a comparative negligence defense is asserted. *See Piroozi v. Eighth Jud. Dist. Ct. ex rel. Cnty. of Clark*, 131 Nev. Adv. Op. 100, 363 P.3d 1168, 1171 (2015). In this case, Mr. Lujan and Harvest collectively asserted a comparative negligence defense. (Ex. 2, at 3:16-21.)

[24] "[B]y abandoning joint and several liability against negligent defendants, the Legislature sought to ensure that a negligent defendant's liability would be limited to an amount proportionate with his or her fault." *Café Moda, LLC v. Palma*, 128 Nev. 78, 82, 272 P.3d 137, 140 (2012) (citing 1973 Nev. Stat., ch. 787, at 1722; Hearing on S.B. 524 Before the Senate Judiciary Comm., 57th Leg. (Nev. April 6, 1973)).

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example, if a jury determines that Defendant A is 80 percent negligent and Defendant B is 20 percent negligent, then Defendant B is only liable for 20 percent of the judgment awarded to the plaintiff. *See Café Moda, LLC v. Palma*, 128 Nev. 78, 84, 272 P.3d 137, 141 (2012).

Here, Harvest and Mr. Lujan jointly asserted an affirmative defense of comparative negligence. (Ex. 2, at 3:16-21.) Despite the fact that Mr. Morgan had alleged negligence-based claims against two defendants, he failed to ask the jury to apportion damages between Mr. Lujan and Harvest as required by NRS 41.141. (*See generally* Mot. at Ex. 1.) Mr. Morgan has not (and cannot) cite to any authority that allows the Court to now determine how to apportion liability between the defendants (assuming there was a factual basis for entry of judgment against Harvest). Indeed, it would be completely contrary to N.R.C.P. 49(a) and *Kinnel* for the Court to find that any portion of the jury's $3 million verdict could be applied to Harvest because that would be a determination of ultimate liability—not a factual finding.

IV. CONCLUSION[25]

Now, dissatisfied with his trial strategy, Mr. Morgan asks this Court to do what it cannot: to enter liability against Harvest despite the complete lack of evidence to prove his claim for either vicarious liability or negligent entrustment. Mr. Morgan's request is not only contrary to the record

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[25] Given the brevity of Mr. Morgan's Motion, his lack of citations to the record, and his failure to truly analyze the evidence and procedure of this case, Harvest is concerned that Mr. Morgan may intend to file a lengthy reply that raises new arguments for the first time. Any attempt to do so would be entirely improper. But, out of an abundance of caution, should Mr. Morgan do so, Harvest reserves the right to request a surreply to address any arguments or evidence not advanced in his Motion.

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in this action, but also to the purpose of Rule 49(a). Thus, it must be denied. Mr. Morgan chose to proceed against only Mr. Lujan at trial and he must now bear the burden of that choice.

DATED this 16th day of August, 2018.

BAILEY❖KENNEDY

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

Attorneys for Defendants
HARVEST MANAGEMENT SUB LLC

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CERTIFICATE OF SERVICE

I certify that I am an employee of BAILEY❖KENNEDY and that on the 16th day of August, 2018, service of the foregoing **DEFENDANT HARVEST MANAGEMENT SUB LLC'S OPPOSITION TO PLAINTIFF'S MOTION FOR ENTRY OF JUDGMENT** was made by mandatory electronic service through the Eighth Judicial District 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:

DOUGLAS J. GARDNER **RANDS, SOUTH & GARDNER** 1055 Whitney Ranch Drive, Suite 220 Henderson, Nevada 89014	Email: *Attorney for Defendant* DAVID E. LUJAN
BENJAMIN P. CLOWARD BRYAN A. BOYACK **RICHARD HARRIS LAW FIRM** 801 South Fourth Street Las Vegas, Nevada 89101 and	Email: Benjamin@richardharrislaw.com Bryan@richardharrislaw.com
MICAH S. ECHOLS TOM W. STEWART **MARQUIS AURBACH COFFING P.C.** 1001 Park Run Drive Las Vegas, Nevada 89145	Email: Mechols@maclaw.com Tstewart@maclaw.com *Attorneys for Plaintiff* AARON M. MORGAN

/s/ Josephine Baltazar
Employee of BAILEY❖KENNEDY

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Josephine Baltazar

From: efilingmail@tylerhost.net
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Courtesy Notification

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Case Number: A-15-718679-C
Case Style: Aaron Morgan, Plaintiff(s)vs.David Lujan, Defendant(s)

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Filing Details	
Case Number	A-15-718679-C
Case Style	Aaron Morgan, Plaintiff(s)vs.David Lujan, Defendant(s)
Date/Time Submitted	8/16/2018 1:02 PM PST
Filing Type	EFileAndServe
Filing Description	Defendant Harvest Management Sub LLC's Opposition to Plaintiff's Motion for Entry of Judgment
Activity Requested	Opposition - OPPS (CIV)
Filed By	Josephine Baltazar
Filing Attorney	Dennis Kennedy

Document Details	
Lead Document	18.08.16 Opp to Mot for Entry of Judgment.pdf
Lead Document Page Count	26
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EXHIBIT 5

EXHIBIT 5

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Attorneys for Defendant
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DISTRICT COURT

CLARK COUNTY, NEVADA

AARON M. MORGAN, individually, Plaintiff, vs. DAVID E. LUJAN, individually; HARVEST MANAGEMENT SUB LLC; a Foreign-Limited-Liability Company; DOES 1 through 20; ROE BUSINESS ENTITIES 1 through 20, inclusive jointly and severally, Defendants.	Case No. A-15-718679-C Dept. No. XI

NOTICE OF ENTRY OF ORDER ON PLAINTIFF'S MOTION FOR ENTRY OF JUDGMENT

PLEASE TAKE NOTICE that an Order on Plaintiff's Motion for Entry of Judgment was entered on November 28, 2018.

///

///

///

A true and correct copy is attached hereto.

DATED this 28th day of November, 2018.

BAILEY❖KENNEDY

By: */s/ Sarah E. Harmon*
DENNIS L. KENNEDY
SARAH E. HARMON
JOSHUA P. GILMORE
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CERTIFICATE OF SERVICE

I certify that I am an employee of BAILEY❖KENNEDY and that on the 28th day of November, 2018, service of the foregoing **NOTICE OF ENTRY OF ORDER ON PLAINTIFF'S MOTION FOR ENTRY OF JUDGMENT** was made by mandatory electronic service through the Eighth Judicial District Court's electronic filing system and/or by depositing a true and correct copy in the U.S. Mail, first class postage prepaid, and addressed to the following at their last known address:

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DISTRICT COURT

CLARK COUNTY, NEVADA

PLEASE NOTE DEPT. CHANGE

AARON M. MORGAN, individually, Plaintiff, vs. DAVID E. LUJAN, individually; HARVEST MANAGEMENT SUB LLC; a Foreign-Limited-Liability Company; DOES 1 through 20; ROE BUSINESS ENTITIES 1 through 20, inclusive jointly and severally, Defendants.	Case No. A-15-718679-C Dept. No. [redacted] XI **ORDER ON PLAINTIFFS' MOTION FOR ENTRY OF JUDGMENT** **Date of Hearing: November 6, 2018** **Time of Hearing: 9:00 A.M.**

On November 6, 2018, at 9:00 a.m., the Motion for Entry of Judgment came before the Court. Tom W. Stewart of Marquis Aurbach Coffing P.C. and Bryan A. Boyack of Richard Harris Law Firm appeared on behalf of Plaintiff Aaron Morgan and Dennis L. Kennedy, Sarah E. Harmon, and Andrea M. Champion of Bailey❖Kennedy appeared on behalf of Defendant Harvest Management Sub LLC.

///

The Court, having examined the briefs of the parties, the records and documents on file, and having heard argument of counsel, and for good cause appearing,

HEREBY ORDERS that the Motion for Entry of Judgment shall be, and hereby is, **DENIED**.

DATED this 26 day of November, 2018.

DISTRICT COURT JUDGE

Respectfully submitted by:

BAILEY❖KENNEDY, LLP

By: _____
DENNIS L. KENNEDY
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JOSHUA P. GILMORE
ANDREA M. CHAMPION
8984 Spanish Ridge Avenue
Las Vegas, Nevada 89148
Attorneys for Defendant Harvest Management Sub LLC

Approved as to form and content by:

MARQUIS AURBACH COFFING P.C.

By: _____
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Attorneys for Plaintiff Aaron Morgan

Josephine Baltazar

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Sent: Wednesday, November 28, 2018 2:48 PM
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Notification of Service

Case Number: A-15-718679-C
Case Style: Aaron Morgan, Plaintiff(s)vs.David Lujan, Defendant(s)
Envelope Number: 3496877

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Case Number	A-15-718679-C
Case Style	Aaron Morgan, Plaintiff(s)vs.David Lujan, Defendant(s)
Date/Time Submitted	11/28/2018 2:46 PM PST
Filing Type	Notice of Entry of Order - NEOJ (CIV)
Filing Description	Notice of Entry of Order on Plaintiff's Motion for Entry of Judgment
Filed By	Josephine Baltazar
Service Contacts	David E Lujan: Lisa Richardson (lrichardson@rsglawfirm.com) Jennifer Meacham (jmeacham@rsglawfirm.com) Harvest Management Sub LLC: Sarah Harmon (sharmon@baileykennedy.com) Dennis Kennedy (dkennedy@baileykennedy.com) Joshua Gilmore (jgilmore@baileykennedy.com) Bailey Kennedy, LLP (bkfederaldownloads@baileykennedy.com) Andrea Champion (achampion@baileykennedy.com)

	Other Service Contacts not associated with a party on the case: "Bryan A. Boyack, Esq." . (bryan@richardharrislaw.com) "Doug Gardner, Esq." . (dgardner@rsglawfirm.com) Benjamin Cloward . (Benjamin@richardharrislaw.com) Douglas R. Rands . (drands@rsgnvlaw.com) Melanie Lewis . (mlewis@rsglawfirm.com) Olivia Bivens . (olivia@richardharrislaw.com) Shannon Truscello . (Shannon@richardharrislaw.com) Tina Jarchow . (tina@richardharrislaw.com) Micah Echols (mechols@maclaw.com) Leah Dell (ldell@maclaw.com) Pauline Batts . (pbatts@rsgnvlaw.com) E-file ZDOC (zdocteam@richardharrislaw.com) Thomas Stewart (tstewart@maclaw.com) Nicole Griffin (ngriffin@richardharrislaw.com) Michelle Monkarsh (mmonkarsh@maclaw.com)

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EXHIBIT 6

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DISTRICT COURT
CLARK COUNTY, NEVADA
* * * * *

AARON MORGAN	.	
	.	
Plaintiff	.	CASE NO. A-15-718679-C
	.	
vs.	.	
	.	DEPT. NO. XI
DAVID LUJAN, et al.	.	
	.	**Transcript of**
Defendants	.	**Proceedings**

BEFORE THE HONORABLE ELIZABETH GONZALEZ, DISTRICT COURT JUDGE

HEARING ON PLAINTIFF'S MOTION FOR ENTRY OF JUDGMENT

TUESDAY, NOVEMBER 6, 2018

APPEARANCES:

FOR THE PLAINTIFF:	BRYAN A. BOYACK, ESQ. THOMAS W. STEWART, ESQ.
FOR THE DEFENDANTS:	DENNIS L. KENNEDY, ESQ. SARAH E. HARMON, ESQ. ANDREA M. CHAMPION, ESQ.
COURT RECORDER:	TRANSCRIPTION BY:
JILL HAWKINS District Court	FLORENCE HOYT Las Vegas, Nevada 89146

Proceedings recorded by audio-visual recording, transcript produced by transcription service.

employee, discusses the facts of the accident. Never does she bring up on cross or direct examination he was on a break, we aren't on the hook here, or any assertion of that. So this is kind of after the fact them trying to escape the clear liability that was presented, although it wasn't stated on the special verdict form, defendant Lujan, defendant Harvest Management. It was the defendant.

THE COURT: Is there any instruction on either negligent entrustment or vicarious liability in the pack of jury instructions?

MR. BOYACK: I don't believe so, Your Honor.

THE COURT: Yeah. Okay. Thanks.

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

MR. STEWART: Thank you, Your Honor.

MR. BOYACK: Thank you, Your Honor.

MR. KENNEDY: And just for purposes of clarification, that judgment will say that the claims against

Harvest Management are dismissed?

THE COURT: It will not, Mr. Kennedy.

MR. KENNEDY: Okay. Well, I'll just have to file a motion.

THE COURT: That's why I say we have to do something next.

MR. KENNEDY: Okay. I'm happy to do that.

THE COURT: I'm going one step at a time.

THE PROCEEDINGS CONCLUDED AT 9:13 A.M.

* * * * *

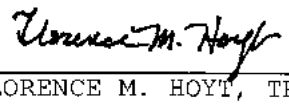
CERTIFICATION

I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE AUDIO-VISUAL RECORDING OF THE PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

AFFIRMATION

I AFFIRM THAT THIS TRANSCRIPT DOES NOT CONTAIN THE SOCIAL SECURITY OR TAX IDENTIFICATION NUMBER OF ANY PERSON OR ENTITY.

FLORENCE HOYT
Las Vegas, Nevada 89146



FLORENCE M. HOYT, TRANSCRIBER

1/17/19

DATE

EXHIBIT 7

EXHIBIT 7

JGJV

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DISTRICT COURT

CLARK COUNTY, NEVADA

AARON M. MORGAN, individually, Plaintiff, vs. DAVID E. LUJAN, individually; HARVEST MANAGEMENT SUB LLC; a Foreign Limited-Liability Company; DOES 1 through 20; ROE BUSINESS ENTITIES 1 through 20, inclusive jointly and severally, Defendants.	CASE NO.: A-15-718679-C Dept. No.: XI **JUDGMENT UPON THE JURY VERDICT**

12-13-18P01:10 RCVD

JUDGMENT UPON THE JURY VERDICT

This action came on for trial before the Court and the jury, the Honorable Linda Marie Bell, District Court Judge, presiding,[1] and the issues having been duly tried and the jury having duly rendered its verdict.[2]

IT IS ORDERED AND ADJUDGED that PLAINTIFF, AARON M. MORGAN, have a recovery against DEFENDANT, DAVID E. LUJAN, for the following sums:

Past Medical Expenses	$208,480.00
Future Medical Expenses	+$1,156,500.00
Past Pain and Suffering	+$116,000.00
Future Pain and Suffering	+$1,500,000.00
Total Damages	**$2,980,980.00**

IT IS FURTHER ORDERED AND ADJUDGED that AARON M. MORGAN's past damages of $324,480 shall bear Pre-Judgment interest in accordance with *Lee v. Ball*, 121 Nev. 391, 116 P.3d 64 (2005) and NRS 17.130 at the rate of 5.00% per annum plus 2% from the date of service of the Summons and Complaint on May 28, 2015, through the entry of the Special Verdict on April 9, 2018:

PRE-JUDGMENT INTEREST ON PAST DAMAGES:

05/28/15 through 04/09/18 = **$65,402.72**

[(1,051 days) at (prime rate (5.00%) plus 2 percent = 7.00%) on $324,480 past damages]

[Pre-Judgment Interest is approximately $62.23 per day]

PLAINTIFF'S TOTAL JUDGMENT

Plaintiff's total judgment is as follows:

Total Damages:	**$2,980,980.00**
Prejudgment Interest:	**$65,402.72**
TOTAL JUDGMENT	**$3,046,382.72**

[1] This case was reassigned to the Honorable Elizabeth Gonzalez, District Court Judge, in July 2018.

[2] *See* Special Verdict filed on April 9, 2018, attached as **Exhibit 1**.

Now, THEREFORE, Judgment Upon the Jury Verdict in favor of the Plaintiff is as follows:

PLAINTIFF, AARON M. MORGAN, is hereby awarded **$3,046,382.72** against DEFENDANT, DAVID E. LUJAN, which shall bear post-judgment interest at the adjustable legal rate from the date of the entry of judgment until fully satisfied. Post-judgment interest at the current 7.00% rate accrues interest at the rate of $584.24 per day.

Dated this 13 day of Dec., 2018.

HONORABLE ELIZABETH GONZALEZ
DISTRICT COURT JUDGE
DEPARTMENT 11

Respectfully Submitted by:

Dated this 12TH day of December, 2018.

MARQUIS AURBACH COFFING

By

Micah S. Echols, Esq.
Nevada Bar No. 8437
Tom W. Stewart, Esq.
Nevada Bar No. 14280
10001 Park Run Drive
Las Vegas, Nevada 89145
Attorneys for Plaintiff, Aaron M. Morgan

[CASE NO. A-15-718679-C—JUDGMENT UPON THE JURY VERDICT]

RICHARD HARRIS LAW FIRM

Exhibit 1

FILED IN OPEN COURT
STEVEN D. GRIERSON
CLERK OF THE COURT
APR - 9 2018
BY: A.M. BROWN, DEPUTY

DISTRICT COURT

CLARK COUNTY, NEVADA

CASE NO: A-15-718679-C

DEPT. NO: VII

AARON MORGAN,

Plaintiff,

vs.

DAVID LUJAN,

Defendant.

SPECIAL VERDICT

We, the jury in the above-entitled action, find the following special verdict on the questions submitted to us:

QUESTION NO. 1: Was Defendant negligent?

ANSWER: Yes ✓ No _____

If you answered no, stop here. Please sign and return this verdict.

If you answered yes, please answer question no. 2.

QUESTION NO.2: Was Plaintiff negligent?

ANSWER: Yes _____ No ✓

If you answered yes, please answer question no. 3.

If you answered no, please skip to question no. 4.

///

A-15-718679-C
SJV
Special Jury Verdict
4738216

2

QUESTION NO. 3: What percentage of fault do you assign to each party?

Defendant: 100

Plaintiff: 0

Total: 100%

Please answer question 4 without regard to you answer to question 3.

QUESTION NO. 4: What amount do you assess as the total amount of Plaintiff's damages? (Please do not reduce damages based on your answer to question 3, if you answered question 3. The Court will perform this task.)

Past Medical Expenses	$ 208,480.00
Future Medical Expenses	$ 1,156,500.00
Past Pain and Suffering	$ 116,000.00
Future Pain and Suffering	$ 1,500,000.00
TOTAL	$ 2,980,980.00

DATED this 9th day of April, 2018.

Arthur J. St. Laurent

FOREPERSON

ARTHUR J. ST. LAURENT

Reception

From: efilingmail@tylerhost.net
Sent: Monday, December 17, 2018 10:02 AM
To: BKfederaldownloads
Subject: Notification of Service for Case: A-15-718679-C, Aaron Morgan, Plaintiff(s)vs.David Lujan, Defendant(s) for filing Judgment on Jury Verdict - JGJV (CIV), Envelope Number: 3581119

Notification of Service

Case Number: A-15-718679-C
Case Style: Aaron Morgan, Plaintiff(s)vs.David Lujan, Defendant(s)
Envelope Number: 3581119

This is a notification of service for the filing listed. Please click the link below to retrieve the submitted document.

Filing Details	
Case Number	A-15-718679-C
Case Style	Aaron Morgan, Plaintiff(s)vs.David Lujan, Defendant(s)
Date/Time Submitted	12/17/2018 10:00 AM PST
Filing Type	Judgment on Jury Verdict - JGJV (CIV)
Filing Description	Judgment Upon the Jury Verdict
Filed By	Peter Floyd
Service Contacts	David E Lujan: Lisa Richardson (lrichardson@rsglawfirm.com) Jennifer Meacham (jmeacham@rsglawfirm.com) Harvest Management Sub LLC: Sarah Harmon (sharmon@baileykennedy.com) Dennis Kennedy (dkennedy@baileykennedy.com) Joshua Gilmore (jgilmore@baileykennedy.com) Bailey Kennedy, LLP (bkfederaldownloads@baileykennedy.com) Andrea Champion (achampion@baileykennedy.com)

	Other Service Contacts not associated with a party on the case: "Bryan A. Boyack, Esq." . (bryan@richardharrislaw.com) "Doug Gardner, Esq." . (dgardner@rsglawfirm.com) Benjamin Cloward . (Benjamin@richardharrislaw.com) Douglas R. Rands . (drands@rsgnvlaw.com) Melanie Lewis . (mlewis@rsglawfirm.com) Olivia Bivens . (olivia@richardharrislaw.com) Shannon Truscello . (Shannon@richardharrislaw.com) Tina Jarchow . (tina@richardharrislaw.com) Micah Echols (mechols@maclaw.com) Leah Dell (ldell@maclaw.com) Pauline Batts . (pbatts@rsgnvlaw.com) E-file ZDOC (zdocteam@richardharrislaw.com) Thomas Stewart (tstewart@maclaw.com) Nicole Griffin (ngriffin@richardharrislaw.com) Michelle Monkarsh (mmonkarsh@maclaw.com)

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EXHIBIT 8

EXHIBIT 8

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Attorneys for Plaintiff, Aaron Morgan

DISTRICT COURT

CLARK COUNTY, NEVADA

AARON M. MORGAN, individually, Plaintiff, vs. DAVID E. LUJAN, individually; HARVEST MANAGEMENT SUB LLC; a Foreign Limited-Liability Company; DOES 1 through 20; ROE BUSINESS ENTITIES 1 through 20, inclusive jointly and severally, Defendants.	Case No.: A-15-718679-C Dept. No.: XI

NOTICE OF APPEAL

Plaintiff, Aaron M. Morgan, by and through his attorneys of record, Marquis Aurbach Coffing and the Richard Harris Law Firm, hereby appeals to the Supreme Court of Nevada from: (1) the Order Denying Plaintiff's Motion for Entry of Judgment, which was filed on

November 28, 2018 and is attached as **Exhibit 1**; and (2) the Judgment Upon the Jury Verdict, which was filed on December 17, 2018 and is attached as **Exhibit 2**.

Dated this 18th day of December, 2018.

MARQUIS AURBACH COFFING

By /s/ Micah S. Echols
Micah S. Echols, Esq.
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CERTIFICATE OF SERVICE

I hereby certify that the foregoing **NOTICE OF APPEAL** was submitted electronically for filing and/or service with the Eighth Judicial District Court on the 18th day of December, 2018. Electronic service of the foregoing document shall be made in accordance with the E-Service List as follows:[1]

Andrea M. Champion	achampion@baileykennedy.com
Joshua P. Gilmore	jgilmore@baileykennedy.com
Sarah E. Harmon	sharmon@baileykennedy.com
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Attorneys for Defendant David E. Lujan

/s/ Leah Dell
Leah Dell, an employee of
Marquis Aurbach Coffing

[1] Pursuant to EDCR 8.05(a), each party who submits an E-Filed document through the E-Filing System consents to electronic service in accordance with NRCP 5(b)(2)(D).

Exhibit 1

ORDR
DENNIS L. KENNEDY
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SARAH E. HARMON
Nevada Bar No. 8106
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Attorneys for Defendant
HARVEST MANAGEMENT SUB LLC

DISTRICT COURT

CLARK COUNTY, NEVADA

PLEASE NOTE DEPT. CHANGE

AARON M. MORGAN, individually, Plaintiff, vs. DAVID E. LUJAN, individually; HARVEST MANAGEMENT SUB LLC; a Foreign-Limited-Liability Company; DOES 1 through 20; ROE BUSINESS ENTITIES 1 through 20, inclusive jointly and severally, Defendants.	Case No. A-15-718679-C Dept. No. [redacted] XI **ORDER ON PLAINTIFFS' MOTION FOR ENTRY OF JUDGMENT** **Date of Hearing: November 6, 2018** **Time of Hearing: 9:00 A.M.**

On November 6, 2018, at 9:00 a.m., the Motion for Entry of Judgment came before the Court. Tom W. Stewart of Marquis Aurbach Coffing P.C. and Bryan A. Boyack of Richard Harris Law Firm appeared on behalf of Plaintiff Aaron Morgan and Dennis L. Kennedy, Sarah E. Harmon, and Andrea M. Champion of Bailey✣Kennedy appeared on behalf of Defendant Harvest Management Sub LLC.

///

The Court, having examined the briefs of the parties, the records and documents on file, and having heard argument of counsel, and for good cause appearing,

HEREBY ORDERS that the Motion for Entry of Judgment shall be, and hereby is, **DENIED.**

DATED this 26 day of November, 2018.

DISTRICT COURT JUDGE

Respectfully submitted by:

BAILEY❖KENNEDY, LLP

By: _____
DENNIS L. KENNEDY
SARAH E. HARMON
JOSHUA P. GILMORE
ANDREA M. CHAMPION
8984 Spanish Ridge Avenue
Las Vegas, Nevada 89148
Attorneys for Defendant Harvest Management Sub LLC

Approved as to form and content by:

MARQUIS AURBACH COFFING P.C.

By: _____
MICAH S. ECHOLS
TOM W. STEWART
1001 Park Run Drive
Las Vegas, Nevada 89145
Attorneys for Plaintiff Aaron Morgan

Exhibit 2

ORDR
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Attorneys for Defendant
HARVEST MANAGEMENT SUB LLC

DISTRICT COURT

CLARK COUNTY, NEVADA

PLEASE NOTE DEPT. CHANGE

AARON M. MORGAN, individually,

Plaintiff,

vs.

DAVID E. LUJAN, individually; HARVEST MANAGEMENT SUB LLC; a Foreign-Limited-Liability Company; DOES 1 through 20; ROE BUSINESS ENTITIES 1 through 20, inclusive jointly and severally,

Defendants.

Case No. A-15-718679-C
Dept. No. [redacted] XI

ORDER ON PLAINTIFFS' MOTION FOR ENTRY OF JUDGMENT

Date of Hearing: November 6, 2018
Time of Hearing: 9:00 A.M.

On November 6, 2018, at 9:00 a.m., the Motion for Entry of Judgment came before the Court. Tom W. Stewart of Marquis Aurbach Coffing P.C. and Bryan A. Boyack of Richard Harris Law Firm appeared on behalf of Plaintiff Aaron Morgan and Dennis L. Kennedy, Sarah E. Harmon, and Andrea M. Champion of Bailey❖Kennedy appeared on behalf of Defendant Harvest Management Sub LLC.

///

The Court, having examined the briefs of the parties, the records and documents on file, and having heard argument of counsel, and for good cause appearing,

HEREBY ORDERS that the Motion for Entry of Judgment shall be, and hereby is, **DENIED**.

DATED this 26 day of November, 2018.

DISTRICT COURT JUDGE

Respectfully submitted by:

BAILEY ❖ KENNEDY, LLP

By: _____
DENNIS L. KENNEDY
SARAH E. HARMON
JOSHUA P. GILMORE
ANDREA M. CHAMPION
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Attorneys for Defendant Harvest Management Sub LLC

Approved as to form and content by:

MARQUIS AURBACH COFFING P.C.

By: _____
MICAH S. ECHOLS
TOM W. STEWART
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Attorneys for Plaintiff Aaron Morgan

Josephine Baltazar

From: efilingmail@tylerhost.net
Sent: Tuesday, December 18, 2018 4:59 PM
To: BKfederaldownloads
Subject: Notification of Service for Case: A-15-718679-C, Aaron Morgan, Plaintiff(s)vs.David Lujan, Defendant(s) for filing Notice of Appeal - NOAS (CIV), Envelope Number: 3593124

Notification of Service

Case Number: A-15-718679-C
Case Style: Aaron Morgan, Plaintiff(s)vs.David Lujan, Defendant(s)
Envelope Number: 3593124

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Filing Details	
Case Number	A-15-718679-C
Case Style	Aaron Morgan, Plaintiff(s)vs.David Lujan, Defendant(s)
Date/Time Submitted	12/18/2018 4:58 PM PST
Filing Type	Notice of Appeal - NOAS (CIV)
Filing Description	Notice of Appeal
Filed By	Peter Floyd
Service Contacts	David E Lujan: Lisa Richardson (lrichardson@rsglawfirm.com) Jennifer Meacham (jmeacham@rsglawfirm.com) Harvest Management Sub LLC: Sarah Harmon (sharmon@baileykennedy.com) Dennis Kennedy (dkennedy@baileykennedy.com) Joshua Gilmore (jgilmore@baileykennedy.com) Bailey Kennedy, LLP (bkfederaldownloads@baileykennedy.com) Andrea Champion (achampion@baileykennedy.com)

	Other Service Contacts not associated with a party on the case: "Bryan A. Boyack, Esq." . (bryan@richardharrislaw.com) "Doug Gardner, Esq." . (dgardner@rsglawfirm.com) Benjamin Cloward . (Benjamin@richardharrislaw.com) Douglas R. Rands . (drands@rsgnvlaw.com) Melanie Lewis . (mlewis@rsglawfirm.com) Olivia Bivens . (olivia@richardharrislaw.com) Shannon Truscello . (Shannon@richardharrislaw.com) Tina Jarchow . (tina@richardharrislaw.com) Micah Echols (mechols@maclaw.com) Leah Dell (ldell@maclaw.com) Pauline Batts . (pbatts@rsgnvlaw.com) E-file ZDOC (zdocteam@richardharrislaw.com) Thomas Stewart (tstewart@maclaw.com) Nicole Griffin (ngriffin@richardharrislaw.com) Michelle Monkarsh (mmonkarsh@maclaw.com)

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EXHIBIT 9

EXHIBIT 9

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Attorneys for Defendant
HARVEST MANAGEMENT SUB LLC

DISTRICT COURT

CLARK COUNTY, NEVADA

AARON M. MORGAN, individually, Plaintiff, vs. DAVID E. LUJAN, individually; HARVEST MANAGEMENT SUB LLC; a Foreign-Limited-Liability Company; DOES 1 through 20; ROE BUSINESS ENTITIES 1 through 20, inclusive jointly and severally, Defendants.	Case No. A-15-718679-C Dept. No. XI **DEFENDANT HARVEST MANAGEMENT SUB LLC'S MOTION FOR ENTRY OF JUDGMENT** Hearing Date: Hearing Time:

Defendant Harvest Management Sub LLC ("Harvest"), hereby requests that the Court enter judgment in favor of Harvest on any and all claims for relief alleged by Plaintiff Aaron Morgan ("Mr. Morgan") in this action. (A proposed Judgment is attached hereto as Exhibit A.) Mr. Morgan failed to present any evidence in support of his claims, failed to refute the defendants' evidence offered in defense of these claims, failed to submit these claims to the jury for determination, and has ostensibly chosen to abandon his claims against Harvest.

///

This Motion is made and based on the following memorandum of points and authorities, the papers and pleadings on file, and any oral argument the Court may allow.

DATED this 21st day of December, 2018.

BAILEY❖KENNEDY

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

Attorneys for Defendant
HARVEST MANAGEMENT SUB LLC

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702.562.8820

NOTICE OF MOTION

PLEASE TAKE NOTICE that Defendant Harvest Management Sub LLC's Motion for Entry of Judgment will come on for hearing before the Court in Department XI, on the 25 day of January, 2019, at the hour of In Chambers :___ __.m., or as soon thereafter as counsel can be heard.

DATED this 21st day of December, 2018.

BAILEY❖KENNEDY

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

Attorneys for Defendant
HARVEST MANAGEMENT SUB LLC

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Although there is some confusion as to what cause of action Mr. Morgan asserted against Harvest in this action — negligent entrustment or vicarious liability — there is no dispute that at the recent trial of this matter, Mr. Morgan wholly failed to pursue — and in fact appears to have abandoned — his claim for relief against Harvest. Specifically:

- He did not reference Harvest in his introductory remarks to the jury regarding the identity of the Parties and expected witnesses, (Ex. 10,[1] at 17:2-24, 25:7-26:3);
- He did not mention Harvest or his claim against Harvest during jury voir dire, (*id.* at 33:2-93:22, 97:6-188:21, 191:7-268:12; Ex. 11,[2] at 3:24-65:7, 67:4-110:22);
- He did not reference Harvest or his claim against Harvest in his opening statement, (Ex. 11, at 126:7-145:17);
- He offered no evidence regarding Harvest's liability for his damages;
- He did not elicit any testimony from any witness that could have supported his claim against Harvest;
- He did not reference Harvest or his claim against Harvest in his closing argument or rebuttal closing argument, (Ex. 12,[3] at 121:4-136:19, 157:13-161:10);
- He did not include his claim against Harvest in the jury instructions, (Ex. 13[4]); and
- He did not include Harvest in the Special Verdict Form, never asked the jury to assess liability against Harvest, and, in fact, gave the jury no option to find Harvest liable for anything, (Ex. 14[5]).

---

[1] Excerpts of Recorder's Tr. of Hrg. Civil Jury Trial (Apr. 2, 2018) are attached as Exhibit 10, at Vol. III of App. at H384-H619.

[2] Excerpts of Recorder's Tr. of Hrg. Civil Jury Trial (Apr. 3, 2018) are attached as Exhibit 11, at Vol. IV of App. at H620-H748.

[3] Excerpts of Recorder's Tr. of Hrg. Civil Jury Trial (Apr. 9, 2018) are attached hereto as Exhibit 12, at Vol. IV of App. at H749-H774.

[4] A true and correct copy of the Jury Instructions (Apr. 9, 2018) is attached as Exhibit 13, at Vol. IV of App. at H775-H814.

[5] A true and correct copy of the Special Verdict (Apr. 9, 2018) is attached as Exhibit 14, at Vol. IV of App. at H815-816.

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In addition to abandoning his claims against Harvest, Mr. Morgan also failed to refute the evidence offered by the defendants at trial which established that Harvest could not, as a matter of law, be liable for either negligent entrustment or vicarious liability — specifically, (1) David Lujan's ("Mr. Lujan") testimony that he was on a lunch break when the accident occurred; and (2) Mr. Lujan's testimony that he had never been in an accident before.

Given the lack of *any* evidence offered at trial against Harvest, Mr. Morgan's claims against Harvest should be dismissed with prejudice and judgment should be entered in favor of Harvest as to Mr. Morgan's express claim for negligent entrustment and his implied claim for vicarious liability.

II. RELEVANT FACTS AND PROCEDURAL HISTORY

A. The Pleadings.

On May 20, 2015, Mr. Morgan filed a Complaint against Mr. Lujan and Harvest. (*See generally* Ex. 1[6].) The only claim alleged against Harvest in the Complaint is captioned "Vicarious Liability/Respondeat Superior," but the allegations of the claim are more akin to a claim for ***negligent entrustment***. (*Id.* at ¶¶ 15-22 (alleging that Harvest negligently entrusted the vehicle to Mr. Lujan despite the fact that it knew or should have known that Mr. Lujan was an incompetent, inexperienced, or reckless driver).) Further, the cause of action fails to allege that Mr. Lujan was acting within the course and scope of his employment at the time of the accident. (*Id.*) Rather, the only reference to "course and scope" in the entire Complaint is as follows:

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

(*Id.* at ¶ 9 (emphasis added).)

On June 16, 2015, Mr. Lujan and Harvest filed Defendants' Answer to Plaintiff's Complaint. (*See generally* Ex. 2.[7]) The Defendants denied Paragraph 9 of the Complaint, including the

[6] A true and correct copy of the Complaint (May 20, 2015) is attached as Exhibit 1, at Vol. I of App. at H001-H006.

[7] A true and correct copy of Defs.'Answer to Pl.'s Compl. (June 16, 2015) is attached as Exhibit 2, at Vol. I of App. at H007-H013.

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purported allegation that Mr. Lujan was acting within the course and scope of his employment at the time of the accident. (Ex. 1, at ¶ 9; Ex. 2, at 2:8-9.) Harvest admitted that it employed Mr. Lujan as a driver, that it owned the vehicle involved in the accident, and that it had entrusted control of the vehicle to Mr. Lujan. (Ex. 1, at ¶¶ 16-18; Ex. 2, at 3:7-8.) However, Harvest denied that: (i) Mr. Lujan was incompetent, inexperienced, or reckless in the operation of the vehicle; (ii) it knew or should have known that he was incompetent, inexperienced, or reckless in the operation of motor vehicles; (iii) Mr. Morgan was injured as a proximate consequence of Harvest's alleged negligent entrustment of the vehicle to Mr. Lujan; and (iv) Mr. Morgan suffered damages as a direct and proximate result of Harvest's alleged negligent entrustment of the vehicle to Mr. Lujan. (Ex. 1, at ¶¶ 19-22; Ex. 2, at 3:9-10.)[8]

B. Discovery.

On April 14, 2016, Mr. Morgan propounded interrogatories on Harvest. (*See generally* Ex. 4.[9]) The interrogatories included a request regarding the background checks Harvest performed prior to hiring Mr. Lujan, (*id.* at 6:25-7:2), and a request regarding any disciplinary actions Harvest had taken against Mr. Lujan in the five years preceding the accident which related to Mr. Lujan's operation of a Harvest vehicle, (*id.* at 7:15-19). There were no interrogatories propounded upon Harvest which concerned whether Mr. Lujan was acting within the course and scope of his employment at the time of the accident. (*See generally* Ex. 4.)

On October 12, 2016, Harvest served its Responses to Mr. Morgan's Interrogatories. (*See generally* Ex. 5.[10]) Harvest answered Interrogatory No. 5, regarding the pre-hiring background checks relating to Mr. Lujan, as follows:

> Mr. Lujan was hired in 2009. As part of the qualification process, *a pre-employment DOT drug test was conducted as well as a criminal background screen and a motor vehicle record.* Also, since he held a

---

[8] Harvest's and Mr. Lujan's Answer was admitted into evidence during the second trial, as Exhibit 26. (Excerpts of Recorder's Tr. of Hrg. Civil Jury Trial (Apr. 5, 2018), attached hereto as Exhibit 3, at Vol. I of App. at H014-H029, at 169:25-170:17.)

[9] A true and correct copy of Pl.'s First Set of Interrogs. to Def. Harvest Mgmt. Sub LLC (Apr. 14, 2016) is attached as Exhibit 4, at Vol. 1 of App. at H030-H038.

[10] A true and correct copy of Def. Harvest Mgmt. Sub, LLC's Resps. to Pl.'s First Set of Interrogs. (Oct. 12, 2016) is attached as Exhibit 5, at Vol. I of App. at H039-H046.

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> CDL, an *inquiry with past/current employers within three years of the date of application was conducted and was* ***satisfactory***. A *DOT physical medical certification was obtained and monitored for renewal* as required. *MVR was ordered yearly to monitor activity of personal driving history* and ***always came back clear***. Required Drug and Alcohol Training was also completed at the time of hire and included the effects of alcohol use and controlled substances use on an individual's health, safety, work environment and personal life, signs of a problem with these and available methods of intervention.

(*Id.* at 3:2-19 (emphasis added).) Further, in response to Interrogatory No. 8, regarding past disciplinary actions taken against Mr. Lujan, Harvest's response was "***None***." (*Id.* at 4:17-23 (emphasis added).)[11]

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

C. <u>The First Trial.</u>

This case was first tried to a jury on November 6, 2017 through November 8, 2017. (*See generally* Ex. 7[12]; Ex. 8.[13]) At the start of the first trial, when the Court asked the prospective jurors if they knew any of the Parties or their counsel, the Court asked about Mr. Morgan, Plaintiff's counsel, Mr. Lujan, and defense counsel. (Ex. 7, at 36:24-37:25.) No mention was made of Harvest, and no objection was raised by Mr. Morgan. (*Id.*) Further, when the Court asked counsel to name their witnesses to determine if the prospective jurors were familiar with any witnesses, no officer, director, employee, or other representative of Harvest was named as a potential witness. (*Id.* at 41:1-21.)

Mr. Morgan also never referenced Harvest, his express claim for negligent entrustment, or his attempted claim for vicarious liability during voir dire or his opening statement. (*Id.* at 45:25-

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[11] Portions of Harvest's Responses to Mr. Morgan's Interrogatories were read to the jury during the second trial, (Excerpts of Recorder's Tr. of Hrg. Civil Jury Trial (Apr. 6, 2018), attached hereto as Exhibit 6, at Vol. I of App. at H047-H068, at 10:22-13:12).

[12] Excerpts of Tr. of Jury Trial (Nov. 6, 2017) are attached as Exhibit 7, at Vol. II of App. at H069-H344.

[13] Excerpts of Tr. of Jury Trial (Nov. 8, 2017) are attached as Exhibit 8, at Vol. III of App. at H345-H357.

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121:20, 124:13-316:24; Ex. 9,[14] at 6:4-29:1.) In fact, Harvest was not mentioned until the third day of the first trial, while Mr. Lujan was on the witness stand. Mr. Lujan's relevant testimony is as follows:

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

(Ex. 8, at 108:23-109:8.)

Mr. Lujan also provided the only evidence during trial which was relevant to claims of either negligent entrustment or vicarious liability:

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

(*Id.* at 111:16-24 (emphasis added).)

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

(*Id.* at 112:8-10 (emphasis added).)

After counsel for Mr. Morgan completed his examination of Mr. Lujan, the court permitted the jury to submit its own questions. A juror — not Mr. Morgan — asked Mr. Lujan:

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

[14] Excerpts of Tr. of Jury Trial (Nov. 7, 2017) are attached as Exhibit 9, at Vol. III of App. at H358-H383.

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(*Id.* at 131:21-24, 132:18, 132:22-133:2 (emphasis added).)

Later that day, the first trial ended prematurely as a result of a mistrial, when defense counsel inquired about a pending DUI charge against Mr. Morgan. (*Id.* at 150:15-152:14, 166:12-18.)

D. The Second Trial.

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

The second trial of this action commenced on April 2, 2018. (*See generally* Ex. 10.) The second trial was very similar to the first trial regarding the lack of reference to and the lack of evidence offered regarding Harvest. First, Harvest was not officially identified as a party when the court requested that counsel identify themselves and the Parties for the jury. In fact, counsel for the defense merely stated as follows:

> MR. GARDNER: Hello everyone. What a way to start a Monday, right? In my firm we've got myself, Doug Gardner and then Brett South, who is not here, but this is Doug Rands, and then my client, Erica[15] is right back here. Let's see, I think that's it for me.

(*Id.* at 17:15-18.) Mr. Morgan did not object or inform the prospective jurors that the case also involved Harvest, or a corporate defendant, or even the employer of Mr. Lujan. (*Id.* at 17:19-24.)

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

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

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[15] In the second trial, Mr. Lujan chose not to attend. Mr. Gardner's introduction referenced Erica Janssen, a representative of Harvest.

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(*Id.* at 25:6-14 (emphasis added).) Again, consistent with his approach in the first trial and throughout the remainder of this second trial, Mr. Morgan did not object or clarify that the case also involved a claim against Mr. Lujan's employer, Harvest. (*Id.* at 25:15-22.)

Finally, when the Court asked the Parties to identify the witnesses they planned to call during trial, no mention was made of any officer, director, employee, or other representative of Harvest — not even the representative, Erica Janssen, who was attending trial. (*Id.* at 25:15-26:3.)

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

Just as with the first trial, Mr. Morgan failed to reference Harvest or his claim for negligent entrustment/vicarious liability during voir dire. (*Id.* at 33:2-93:22, 97:6-188:21, 191:7-268:12; Ex. 11, at 3:24-65:7, 67:4-110:22.) Moreover, during Mr. Morgan's opening statement, Plaintiff's counsel never made a single reference to Harvest, a corporate defendant, vicarious liability, negligent entrustment, or even the fact that there were two defendants in the action. (Ex. 11, at 126:7-145:17.) Plaintiff's counsel merely stated:

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

(*Id.* at 126:15-25 (emphasis added).) Plaintiff's counsel made no reference to any evidence to be presented during the trial which would demonstrate that Mr. Lujan was acting in the course and scope of his employment at the time of the accident or that Harvest negligently entrusted the vehicle to Mr. Lujan — rather, he acknowledged that Mr. Lujan was at lunch at the time of the accident. (*Id.* at 126:7-145:17.)

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

On the fourth day of the second trial, Mr. Morgan called Erica Janssen, the Rule 30(b)(6) representative of Harvest, as a witness during his case in chief. (Ex. 3, at 164:13-23.) Ms. Janssen

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confirmed that it was Harvest's understanding that Mr. Lujan had been at a park in a shuttlebus having lunch and that the accident occurred as he exited the park:

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

(*Id.* at 168:15-23 (emphasis added).)

Mr. Morgan never asked Ms. Janssen where she was employed, her title, whether Harvest employed Mr. Lujan, what Mr. Lujan's duties were, or any other questions that might have elicited evidence to support a claim for negligent entrustment or vicarious liability. (*Id.* at 164:21-177:17; Ex. 6, at 4:2-6:1.) In fact, it wasn't until redirect examination that Mr. Morgan even referenced the fact that Ms. Janssen was in risk management for Harvest:

> [MR. CLOWARD:]
> Q: So where it says, on interrogatory number 14, and you can follow along with me:
>
> > "Please provide the full name of the person answering the interrogatories on behalf of the Defendant, Harvest Management Sub, LLC, and state in what capacity your [*sic*] are authorized to respond on behalf of said Defendant.
> > "A. Erica Janssen, Holiday Retirement, Risk Management."
>
> A: Yes.

(Ex. 6, at 11:18-25.) Other than this acknowledgement that Ms. Janssen executed interrogatory responses on behalf of Harvest, Mr. Morgan, again, failed to elicit any evidence on redirect examination to support a claim for negligent entrustment or vicarious liability. (*Id.* at 9:23-12:6, 13:16-15:6.)

On the fifth day of the second trial, Mr. Morgan rested his case (*id.* at 55:6-7), again, with no evidence presented to support a claim for vicarious liability or negligent entrustment — i.e., evidence of Mr. Lujan's driving history; Harvest's knowledge of Mr. Lujan's driving history;

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disciplinary actions Harvest took against Mr. Lujan prior to the accident; background checks Harvest performed on Mr. Lujan; alcohol and drug testing Harvest performed on Mr. Lujan; Mr. Lujan's job duties; Harvest's policy regarding the use of company vehicles to drive to and from lunch; whether Mr. Lujan was required to clock-in and clock-out during his shifts; or whether any residents of the retirement home were passengers on the bus at the time of the accident, among other facts.[16]

During the defense's case in chief — not Mr. Morgan's — defense counsel read portions of Mr. Lujan's testimony from the first trial into the record. (*Id.* at 195:7-203:12.) As referenced above, this testimony included the following facts: (1) Mr. Lujan worked as a bus driver for Montara Meadows at the time of the accident; (2) Harvest was the "corporate office" for Montara Meadows; (3) the accident occurred when Mr. Lujan was leaving Paradise Park; and (4) Mr. Lujan had never been in an "accident like that" or an accident in a bus before. (*Id.* at 195:8-17, 195:25-196:10, 196:19-24, 197:8-10.)

This testimony, coupled with Ms. Janssen's testimony that Mr. Lujan was on his lunch break at the time of the accident, is the complete universe of evidence offered at the second trial that even tangentially concerns Harvest.

4. There Are No Jury Instructions Pertaining to the Claim Against Harvest.

Mr. Morgan never submitted any jury instructions ***pertaining to vicarious liability, actions within the course and scope of employment, negligent entrustment, or corporate liability.*** (*See generally* Ex. 13.) Again, this is entirely consistent with Mr. Morgan's trial strategy. He all but ignored Harvest throughout the trial process.

5. Mr. Morgan Failed to Include Harvest in the Special Verdict Form.

On the last day of trial, before commencing testimony for that day, the Court provided the Parties with a sample jury form that the Court had used in its last car accident trial.

> THE COURT: Take a look and see if – will you guys look at that verdict form? *I know it doesn't have the right caption. I know it's just the one we used the last trial.* See if that looks sort of okay.

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[16] It should be noted that despite the lack of evidence on these issues, Plaintiff's counsel stated, during his closing argument, that there were no passengers on the bus at the time of the accident. (Ex. 12, at 124:15-17) ("That this company transporting our elderly members of the community is going to follow the rules of the road. ***Aren't we lucky that there weren't other people on the bus?*** Aren't we lucky?") (emphasis added)).

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

(Ex. 12, at 5:20-6:1 (emphasis added).) Later that same day, after the defense rested its case, Plaintiff's counsel informed the Court that it only wanted to make one change to the special verdict form that the Court had proposed:

> MR. BOYACK: On the verdict form we just would like the past and future medical expenses and pain and suffering to be differentiated.
> THE COURT: Yeah. Let me see.
> MR. BOYACK: Just instead of the general.
> THE COURT: That's fine. That's fine.
> MR. BOYACK: Yeah. ***That's the only change.***
> THE COURT: ***That was just what we had laying around, so.***
> MR. BOYACK: Yeah.
> THE COURT: So you want – got it. Yeah. That looks great. I actually prefer that as well.
> MR. BOYACK: Yeah. ***That was the only modification.***
> THE COURT: That's better if we have some sort of issue.
> MR. BOYACK: Right.

(*Id.* at 116:11-23 (emphasis added).) The Special Verdict Form approved by Mr. Morgan — after his edits were accepted and incorporated by the Court — makes no mention of Harvest (which is entirely consistent with Mr. Morgan's trial strategy):

- The Special Verdict form only asked the jury to determine whether the "***Defendant***" was negligent, (Ex. 14, at 1:17 (emphasis added));
- The Special Verdict form did not ask the jury to find Harvest liable for anything, (*id.*); and
- The Special Verdict form directed the jury to apportion fault only between "***Defendant***" and Plaintiff, with the percentage of fault totaling 100 percent, (*id.* at 2:1-4 (emphasis added)).

Thus, Mr. Morgan chose not to present any claim against Harvest to the jury for determination.

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

Finally, in closing arguments, Plaintiff's counsel never even mentioned Harvest or Mr. Morgan's claim for negligent entrustment or vicarious liability. (Ex. 12, at 121:5-136:19.) Further, and perhaps the clearest example of Mr. Morgan's decision to abandon his claims against Harvest,

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Plaintiff's counsel ***explained to the jury, in closing, how to fill out the Special Verdict form.*** His remarks on liability were ***limited exclusively to Mr. Lujan***:

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

(Id. at 124:20-125:6 (emphasis added).) Plaintiff's counsel also failed to mention Harvest or the claim alleged against Harvest in his rebuttal closing argument. (*Id.* at 157:13-161:10.)

E. Plaintiff's Motion for Entry of Judgment Against Harvest Was Denied By This Court.

On July 30, 2018, Mr. Morgan filed a Motion for Entry of Judgment seeking to apply the jury's verdict against Mr. Lujan against Harvest. On November 28, 2018, this Court entered an Order denying Mr. Morgan's Motion, finding that no claims against Harvest were ever presented to the jury for determination.

III. LEGAL ARGUMENT

A. Mr. Morgan Voluntarily Abandoned His Claim Against Harvest and Chose Note to Present Any Claim Against Harvest to the Jury for Determination.

The record in this case conclusively establishes that Mr. Morgan made a conscious choice and/or strategic decision to abandon his claim against Harvest at trial. Mr. Morgan never mentioned Harvest during the introductory remarks to the jury in which the Parties and expected witnesses were introduced to the jury. (Ex. 10, at 17:2-24, 25:7-26:3.) Mr. Morgan never mentioned Harvest to the jury during voir dire or examined prospective jurors about their feelings regarding corporate liability, negligent entrustment, or vicarious liability. (*Id.* at 33:2-93:22, 97:6-188:21, 191:7-268:12; Ex. 11, at 3:24-65:7, 67:4-110:22.) Mr. Morgan never mentioned Harvest, vicarious liability, negligent

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entrustment, or even corporate liability in his opening statement. (Ex. 11, at 126:7-145:17.) Mr. Morgan never offered a single piece of evidence or elicited any testimony from any witness which would prove the elements of either vicarious liability or negligent entrustment. Mr. Morgan never mentioned Harvest, vicarious liability, negligent entrustment, or corporate liability in his closing argument or rebuttal closing argument. (Ex. 12, at 121:4-136:19, 157:13-161:10.) Mr. Morgan failed to include questions relating to Harvest's liability or the apportionment of fault to Harvest in the Special Verdict form, despite requesting revisions to the damages question in the sample Special Verdict form proposed by the Court. (Ex. 12, at 116:11-23; *see also* Ex. 14.) Finally, Mr. Morgan failed to include a single jury instruction relating to vicarious liability, negligent entrustment, or corporate liability. (Ex. 13.)

Mr. Morgan employed the same strategy for litigating his claims in the first trial — he chose to focus solely on Mr. Lujan's liability for negligence. Harvest was not mentioned in the introductory remarks to the jurors, in voir dire, in opening statements, or in the examination of any witness. (Ex. 7, at 29:4-17, 36:24-37:25, 41:1-21, 45:25-121:20, 124:13-316:24; Ex. 9, at 6:4-29:1.) Thus, the record clearly demonstrates that Mr. Morgan abandoned his claim against Harvest — likely due to a lack of evidence.

Typically, when a party chooses to abandon his or her claims at trial, the claims are dismissed with prejudice by stipulation either before or after the trial. It is rare that a party fails to litigate his or her alleged claims against a party yet refuses to dismiss the claims and insists that the abandoned claims should be resolved in his or her favor. Because Mr. Morgan has not sought the voluntary dismissal of his claims, Harvest respectfully requests that this Court enter judgment in favor of Harvest and against Mr. Morgan on both the express claim for negligent entrustment and the implicitly alleged claim for vicarious liability. Mr. Morgan had the opportunity for the jury to render a decision on these claims and voluntarily and intentionally chose not to present them to the jury for determination; therefore, Mr. Morgan should not be given another bite at the apple.

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B. Based on the Evidence Presented at Trial, Harvest Is Entitled to Judgment in Its Favor as to Mr. Morgan's Claim for Either Negligent Entrustment or Vicarious Liability.

As the plaintiff, Mr. Morgan bore the burden of proving his claims against Harvest at trial. *Porter v. Sw. Christian Coll.*, 428 S.W.3d 377, 381 (Tex. App. 2014) ("A plaintiff pleading respondeat superior bears the burden of establishing that the employee acted within the course and scope of his employment."); *Montague v. AMN Healthcare, Inc.*, 168 Cal. Rptr. 3d 123, 126 (Cal. Ct. App. 2014) ("The plaintiff bears the burden of proving that the employee's tortious act was committed within the scope of his or her employment."); *Willis v. Manning*, 850 So. 2d 983, 987 (La. Ct. App. 2003) (recognizing that the plaintiff bears the burden of proof on a claim for negligent entrustment); *Dukes v. McGimsey*, 500 S.W.2d 448, 451 (Tenn. Ct. App. 1973) ("The plaintiff has the burden of proving negligent entrustment of an automobile.") However, Mr. Morgan failed to offer any evidence in support of these claims — primarily, evidence that Mr. Lujan was acting in the course and scope of his employment at the time of the accident, or evidence that Harvest knew or reasonably should of known that Mr. Lujan was an inexperienced, incompetent, and/or reckless driver.

Not only did Mr. Morgan fail to prove his claim, but the evidence adduced at trial actually demonstrated that Harvest could not, as a matter of law, be liable for either vicarious liability or negligent entrustment. Specifically, the ***undisputed evidence*** offered at trial proved that Mr. Lujan was at lunch at the time of the accident and had never been in an accident before. (Ex. 3, at 168:15-23; Ex. 6, at 196:19-24, 197:8-10.) Based on such unrefuted evidence, judgment should be entered in favor of Harvest.

J&C Drilling Co. v. Salaiz, 866 S.W.2d 632 (Tex. App. 1993), is instructive on this issue:

> We reject appellees' contention that the issue of course and scope was not contested. Appellants' answer contained a general denial, which put in issue all of the allegations of appellees' petition, including the allegation that Gonzalez was acting in the course and scope of his employment with J&C. Because appellees had the burden of proof on this issue, it was not necessary for appellants to present evidence negating course and scope in order to contest the issue. In any event, as is discussed below, evidence was presented that Gonzalez was

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> on a personal errand at the time of the accident, refuting the allegation that he was acting in the course and scope of his employment.

(*Id.* at 635).

1. Mr. Morgan Did Not Prove a Claim for Vicarious Liability, and Based on the Sole Evidence Offered at Trial Relating to This Claim, Judgment Should Be Entered in Favor of Harvest.

While Mr. Morgan's Complaint states one claim for relief against Harvest entitled "Vicarious Liability/Respondeat Superior," the allegations contained therein do not actually reflect a theory of respondeat superior — i.e., that Mr. Lujan was acting within the course and scope of his employment with Harvest at the time of the accident. (*See* Ex. 1 at ¶¶ 15-22.) Rather, his claim was akin to a claim for negligent entrustment, alleging that: (1) Mr. Lujan was employed as a driver for Harvest; (2) Harvest entrusted him with the vehicle; (3) Mr. Lujan was an incompetent, inexperienced, and/or reckless driver; and (4) Harvest actually knew, or should have known, of Mr. Lujan's inexperience or incompetence. (*See id.*)

Even assuming *arguendo* that Mr. Morgan alleged a claim for vicarious liability, he failed to prove this claim at trial. Vicarious liability and/or respondeat superior applies to an employer only 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, 1225-26, 925 P.2d 1175, 1179, 1180-81 (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 the very task assigned to him'") (quoting *Prell Hotel Corp. v. Antonacci*, 86 Nev. 390, 391, 469 P.2d 399, 400 (1970)).

Mr. Morgan failed to offer any evidence as to Mr. Lujan's status at the time of the accident. The *only* facts adduced at trial that are related to Mr. Lujan's employment were: (1) that Mr. Lujan was an employee of Montara Meadows (a bus driver); (2) that Mr. Lujan drove the bus to Paradise Park for a lunch break; (3) that the accident occurred as Mr. Lujan was exiting the park; and (3) that Harvest is the "corporate office" of Montara Meadows. (*See* Ex. 3, at 168:15-23; Ex. 6, at 195:8-17, 195:25-196:10.)

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Mr. Morgan failed to establish whether Mr. Lujan was "on the clock" during his lunch break, whether Mr. Lujan had returned to work and was transporting passengers at the time of the accident, whether Mr. Lujan had to "clock in" after his lunch break, whether Mr. Lujan was permitted to use a company vehicle while on his lunch break, or whether Harvest Management even knew that Mr. Lujan was using a company vehicle during his lunch breaks. Without developing these facts, there is insufficient evidence, under Nevada law, to conclude that Mr. Lujan was acting in the course and scope of his employment at the time of the accident.

Moreover, the evidence offered by Mr. Lujan and Harvest demonstrates that Harvest is not vicariously liable for Mr. Morgan's injuries. Nevada has adopted the "going and coming rule." Under this rule, "[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." *Molino v. Asher*, 96 Nev. 814, 817-18, 618 P.2d 878, 879-80 (1980); *see also Nat'l Convenience Stores, Inc. v. Fantauzzi*, 94 Nev. 655, 658, 584 P.2d 689, 691 (1978). The rule is premised upon the idea that the "'employment relationship is "suspended" from the time the employee leaves until he returns, or that in commuting, he is not rendering service to his employer.'" *Tryer v. Ojai Valley Sch.*, 12 Cal. Rptr. 2d 114, 116 (Cal. Ct. App. 1992) (quoting *Hinman v. Westinghouse Elec. Co.*, 471 P.2d 988, 990-91 (Cal. 1970)).

While the Nevada Supreme Court has not specifically addressed whether an employer is vicariously liable for an employee's actions during a lunch break, the express language of and policy behind the "going and coming rule" suggests that an employee is not acting within the course and scope of his employment when he commutes to and from lunch during a break from his employment. Moreover, other jurisdictions have routinely determined that employers ***are not liable for an employee's negligence during a lunch break***. *See e.g., Gant v. Dumas Glass & Mirror, Inc.*, 935 S.W. 2d 202, 212 (Tex. App. 1996) (holding that an employer was not liable under respondeat superior when its employee rear-ended the plaintiff while driving back from his lunch break in a company vehicle because the test is not whether the employee is returning from his personal undertaking to "***possibly*** engage in work" but rather whether the employee ***has*** "returned to the zone of his employment" and engaged in the employer's business); *Richardson v. Glass*, 835 P.2d 835,

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838 (N.M. 1992) (finding the employer was not vicariously liable for the employee's accident during his lunch break because there was no evidence of the employer's control over the employee at the time of the accident); *Gordon v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 411 So. 2d 1094, 1098 (La. Ct. App. 1982) ("Ordinarily, an employee who leaves his employer's premises and takes his noon hour meal at home or some other place of his own choosing is outside the course of his employment from the time he leaves the work premises until he returns.").

Because Mr. Morgan failed to offer any evidence proving that Mr. Lujan was acting within the course and scope of his employment at the time of the accident — and the only evidence regarding Mr. Lujan's actions at the time of the accident demonstrate that he was on a lunch break — as a matter of law, Mr. Morgan's implicit claim for vicarious liability should be dismissed with prejudice and judgment should be entered in favor of Harvest.

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2. Mr. Morgan Also Failed to Prove to the Jury That Harvest Is Liable for Negligent Entrustment.

In Nevada, "a person who knowingly entrusts a vehicle to an inexperienced or incompetent person" may be found liable for damages resulting therefrom. *Zugel by Zugel v. Miller*, 100 Nev. 525, 527, 688 P.2d 310, 312 (1984). To establish negligent entrustment, a plaintiff must demonstrate: (1) that an entrustment actually occurred; and (2) that the entrustment was negligent. *Id.* at 528, 688 P.2d at 313.

Harvest conceded that Mr. Lujan was its employee and that it entrusted him with a vehicle — satisfying the first element of a negligent entrustment claim; however, the second element was contested and never proven to a jury. (Ex. 2, at 3:9-10.) Mr. Morgan offered no evidence of Harvest's negligence in entrusting Mr. Lujan with a company vehicle. He adduced no evidence that Mr. Lujan was an inexperienced or incompetent driver. In fact, the only evidence in the record relating to Mr. Lujan's driving history demonstrates that ***he has never been in an accident before.*** (*See* Ex. 6, at 196:19-24; 197:8-10).

Mr. Morgan also failed to offer any evidence regarding Harvest's knowledge of Mr. Lujan's driving history. This is likely because Harvest's interrogatory responses demonstrated early in the

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case that it thoroughly checked Mr. Lujan's background prior to hiring him, and Harvest's annual check of Mr. Lujan's motor vehicle record "always came back clear." (Ex. 5, at 3:2-19.)

Based on the failure of evidence offered by Mr. Morgan, and Mr. Lujan's undisputed testimony regarding his lack of prior car accidents, as a matter of law, Mr. Morgan's express claim for negligent entrustment should be dismissed with prejudice and judgment should be entered in favor of Harvest.

IV. CONCLUSION

For the foregoing reasons, Harvest requests that the Court enter judgment in its favor as to Mr. Morgan's claim for negligent entrustment (or vicarious liability). A proposed Judgment is attached hereto as Exhibit A.

DATED this 21st day of December, 2018.

BAILEY❖KENNEDY

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

I certify that I am an employee of BAILEY❖KENNEDY and that on the 21st day of December, 2018, service of the foregoing **DEFENDANT HARVEST MANAGEMENT SUB LLC'S MOTION FOR ENTRY OF JUDGMENT** was made by mandatory electronic service through the Eighth Judicial District Court's electronic filing system to the following:

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DISTRICT COURT

CLARK COUNTY, NEVADA

AARON M. MORGAN, individually, Plaintiff, vs. DAVID E. LUJAN, individually; HARVEST MANAGEMENT SUB LLC; a Foreign-Limited-Liability Company; DOES 1 through 20; ROE BUSINESS ENTITIES 1 through 20, inclusive jointly and severally, Defendants.	Case No. A-15-718679-C Dept. No. XI **REPLY IN SUPPORT OF DEFENDANT HARVEST MANAGEMENT SUB LLC'S MOTION FOR ENTRY OF JUDGMENT; AND OPPOSITION TO PLAINTIFF'S COUNTER-MOTION TO TRANSFER CASE BACK TO CHIEF JUDGE BELL FOR RESOLUTION OF POST-VERDICT ISSUES** Hearing Date: January 25, 2019 Hearing Time: In Chambers

Defendant Harvest Management Sub LLC ("Harvest") hereby files this Reply in Support of its Motion for Entry of Judgment, and hereby opposes Plaintiff Aaron M. Morgan's ("Mr. Morgan") Counter-Motion to Transfer Case Back to Chief Judge Bell for Resolution of Post-Verdict Issues.

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This Reply and Opposition to Counter-Motion is based on the following memorandum of points and authorities, the papers and pleadings on file, and any argument heard by the Court.

DATED this 23rd day of January, 2019.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Mr. Morgan pled one claim against Harvest in his Complaint — a claim for negligent entrustment.[1] (App. of Exs. to Harvest's Mot. for Entry of J. Vol. I, Ex. 1, at 3:19-4:12.) Mr. Morgan does not oppose Harvest's Motion for Entry of Judgment ("Motion") as to this claim for relief. Therefore, Harvest's Motion should be granted, this claim should be dismissed with prejudice, and Harvest's proposed judgment, attached as Exhibit A to its Motion, should be entered against Mr. Morgan.

Despite Mr. Morgan's concession that judgment should be entered in favor of Harvest on his claim for negligent entrustment, Mr. Morgan still opposes Harvest's Motion — as to an unpled claim of vicarious liability — on several grounds which each fail as a matter of fact or law. First, Mr. Morgan contends that this Court lacks jurisdiction to decide Harvest's Motion, and that Harvest's

[1] While Mr. Morgan may have captioned this claim for relief "Vicarious Liability/Respondeat Superior Against Defendant," the allegations of the claim clearly relate solely to the elements of a claim for negligent entrustment (i.e, Harvest "entrust[ed]" control of its vehicle to Mr. Lujan, who was an "incompetent, inexperienced, or reckless driver"; Harvest knew or should have known of Mr. Lujan's incompetence, inexperience, or recklessness; Mr. Morgan was injured as a proximate cause of Harvest's "negligent entrustment" of the vehicle; and Mr. Morgan suffered damages in excess of $10,000 as a result of Harvest's "negligent entrustment"). (App. of Exs. to Harvest's Mot. for Entry of J., Vol. I, Ex. 1, at 3:19-4:12.)

Motion is procedurally improper, because he has attempted to appeal from this Court's November 28, 2018 Order Denying Plaintiff's Motion for Entry of Judgment and the December 17, 2018 Judgment Upon the Jury Verdict (which has not yet been entered by this Court). (Pl.'s Opp'n at 8:3-10:10.) However, Mr. Morgan's attempt to appeal is invalid because no final judgment has been entered in this case. Therefore, concurrently with the filing of this Reply, Harvest has filed a motion with the Nevada Supreme Court to dismiss this "improper" appeal. Because this Court retains jurisdiction over this action, Harvest's Motion was properly filed.

Second, Mr. Morgan moved for this action to be transferred back to Chief Judge Bell for determination because he believes she is more familiar with the events at the April 2018 trial and is better able to decide this matter. (*Id.* at 10:11-11:17.) Essentially, Mr. Morgan is hoping to improperly obtain reconsideration of this Court's determination on his Motion for Entry of Judgment. If Chief Judge Bell's participation as the trial judge was a necessity to resolving these "post-verdict issues," Mr. Morgan should have moved for a transfer prior to the hearing on his Motion for Entry of Judgment. Alternatively, if Mr. Morgan believes this Court erred in denying his Motion for Entry of Judgment, he should have filed a timely motion for reconsideration. He failed to take either action, and he has failed to demonstrate that a transfer of the case at this late juncture is necessary or proper. This Court has the entire record of this case, including all trial transcripts, available for its review and is more than capable of deciding Harvest's Motion. Moreover, a transfer of judges is not going to change the fact that Mr. Morgan failed to present any evidence against Harvest at trial, failed to instruct the jury on any claim against Harvest, and failed to even present a claim against Harvest to the jury for determination.

Third, Mr. Morgan asserts that Harvest's Motion fails because Harvest is judicially estopped from seeking entry of judgment pursuant to Nevada Rule of Civil Procedure 49(a). (*Id.* at 11:18-12:20.) However, Harvest's Motion is not based upon NRCP 49(a). Rather, Harvest has moved for entry of judgment because Mr. Morgan: (1) intentionally abandoned his claim; and/or (2) failed to prove the elements of his claim at trial. This has nothing to do with a post-trial resolution of an issue of fact that was mistakenly omitted from the jury's determination.

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Despite the fact that Mr. Morgan never pled a claim for vicarious liability, his last and final argument in opposition to Harvest's Motion is that this claim was "tried by consent," and the jury found Harvest liable because this unpled claim was "undisputed" at trial. (*Id.* at 5:3-4, 12:21-16:10.) Mr. Morgan's assertions are completely unsupported by the record because: (1) Mr. Morgan never provided notice that he intended to try a claim of vicarious liability to the jury; (2) Harvest never impliedly or expressly consented to trial of an unpled, unnoticed claim for vicarious liability; (3) Mr. Morgan bore the burden of proof on this unpled claim, and he failed to offer any evidence proving that the accident occurred in the course and scope of Defendant David E. Lujan's ("Mr. Lujan") employment with Harvest; (4) the evidence offered by the Defendants at trial demonstrated that Mr. Lujan could not have been acting within the course and scope of his employment, because, at the time of the accident, he was on his lunch break; (5) Mr. Morgan failed to refute the evidence that the accident occurred during Mr. Lujan's lunch break; (6) no jury instructions addressed a claim for vicarious liability, and no claim for vicarious liability was ever presented to the jury for determination; and (7) this Court has already determined that the jury's verdict did not include any claim for relief alleged against Harvest, and that it could not enter judgment against Harvest.

As a natural and logical consequence of this Court's denial of Mr. Morgan's Motion for Entry of Judgment, Harvest now respectfully requests that this Court dismiss with prejudice any and all claims which Mr. Morgan alleged (or could have alleged) in this case and enter judgment in favor of Harvest on all such claims.

II. ARGUMENT

A. Mr. Morgan Has Not Appealed From a Final Judgment; Therefore, This Court Retains Jurisdiction Over This Action.

Mr. Morgan contends that this Court has been divested of jurisdiction to decide Harvest's Motion because, on December 18, 2018, he appealed from this Court's Order denying his own Motion for Entry of Judgment and the Judgment Upon Jury Verdict against Mr. Lujan. (*Id.* at 2:27-3:5, 7:4-6, 7:17-19, 8:3-10:10.) However, neither the Order denying Mr. Morgan's Motion for Entry of Judgment nor the Judgment Upon Jury Verdict is a final judgment because the single claim alleged against Harvest remains pending.

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"[A] final judgment is one that disposes of ***all the issues*** presented in the case, and ***leaves nothing for the future consideration of the court***, except for post-judgment issues such as attorney's fees and costs." *Lee v. GNLV Corp.*, 116 Nev. 424, 426, 996 P.2d 416, 417 (2000) (emphasis added). The Court's ruling on Mr. Morgan's Motion for Entry of Judgment and the Judgment Upon Jury Verdict against Mr. Lujan only dispose of Mr. Morgan's claims against Mr. Lujan — they do not address Mr. Morgan's claim for relief against Harvest.

At the hearing on Mr. Morgan's Motion for Entry of Judgment, after the Court denied Mr. Morgan's Motion, Harvest sought clarification that the judgment against Mr. Lujan would also dismiss all claims alleged against Harvest, and this Court explicitly instructed Harvest that it would need to file a motion seeking such relief. (Ex. 1,[2] at 9:18-10:8.) Therefore, it was clear that Mr. Morgan's claim against Harvest had not been resolved as a result of the jury's verdict in the second trial and had not yet been dismissed by the Court.

Mr. Morgan failed to move for certification of his Judgment against Mr. Lujan as a final judgment pursuant to Nevada Rule of Civil Procedure 54(b). Rule 54(b) states that "[w]hen multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. *In the absence of such determination and direction, any order or other form of decision*, however designated, *which adjudicates the rights and liabilities of fewer than all the parties* ***shall not terminate the action as to any of the parties*** . . . ." (Emphasis added.)

Because the Court has not yet disposed of Mr. Morgan's claim against Harvest, his appeal is premature. As such, the Supreme Court has no jurisdiction over this action, and Harvest has concurrently filed a Motion to Dismiss in the Nevada Supreme Court. *See Rust v. Clark Cnty. Sch. Dist.*, 103 Nev. 686, 688, 747 P.2d 1380, 1381 (1988) ("Generally, a premature notice of appeal fails to vest jurisdiction in [the Supreme Court].").[3]

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[2] A true and correct copy of excerpts from the Transcript of Hearing on Plaintiff's Motion for Entry of Judgment (Nov. 6, 2018) is attached hereto as Exhibit 1.

[3] It is unclear how Mr. Morgan intends to demonstrate that he has appealed from a final judgment. His Opposition merely makes general, conclusory statements that this Court has already entered a final judgment. (Pl.'s

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Moreover, because no final judgment has been entered in this action, Harvest's Motion is not a procedurally improper motion seeking to "reopen, revisit, or supplement" a final judgment. (Pl.'s Opp'n at 10:5-10.) Mr. Morgan mistakenly contends that "the Order Denying Plaintiff's Motion for Entry of Judgment involve[s] the exact same issue as the motion currently before the Court — whether the jury's verdict supported a judgment against both Defendants." (*Id.* at 9:11-15.) However, Harvest successfully opposed Mr. Morgan's Motion for Entry of Judgment and has no desire to "reopen" or "revisit" this Court's decision. Rather, as a logical and natural consequence of the Court's decision, Harvest's Motion only seeks to dispose of the sole remaining claim in this case and only relates to the dismissal with prejudice of Mr. Morgan's abandoned and/or unproven claim against Harvest.

B. Transfer of This Action Back to Chief Judge Bell Is Unnecessary, Improper, and Would Only Serve to Promote Confusion.

Mr. Morgan boldly requests that this action be transferred back to Chief Judge Bell because if it were not for ***her*** "error," Mr. Morgan would not be in the position of defending against entry of judgment in favor of Harvest.[4] (*Id.* at 2:22-23, 10:13-19.) However, Mr. Morgan fails to explain how Chief Judge Bell is responsible for:

- ***His*** failure to inform the jury that he had alleged claims against both Mr. Lujan and Harvest;
- ***His*** failure to mention Harvest, his claim against Harvest, or even corporate liability in voir dire;
- ***His*** failure to reference Harvest or his claim against Harvest in his opening statement;
- ***His*** failure to offer any evidence regarding Harvest's liability for his damages;

Opp'n at 3:2.) Moreover, Mr. Morgan's Docketing Statement for his appeal to the Nevada Supreme Court was scheduled to be filed on January 16, 2019, but he requested an automatic two-week extension of time until January 30, 2019.

[4] Despite Mr. Morgan's assertions, Chief Judge Bell committed no "error" with regard to the Special Verdict Form. Chief Judge Bell provided the Parties with a sample form from her most recent personal injury action which was "similar, sort of" to this case. (App. of Exs. to Harvest's Mot. for Entry of J., Vol. IV, Ex. 12, at 5:20-6:1; *see also id.* at Ex. 12, at 116:11-17 (stating that the sample verdict form provided by Chief Judge Bell "was just what [the Court] had laying around"). Chief Judge Bell requested that the parties revise the sample form as necessary — including the caption page — and Mr. Morgan chose only to revise the categories of damages included in the form as opposed to the substantive questions regarding the Defendants' liability. (*Id.* at Ex. 12, at 116:11-23, Ex. 14.)

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- ***His*** failure to elicit any testimony from any witness that could have supported his claim against Harvest;
- ***His*** failure to mention Harvest or his claim against Harvest in his closing argument or his rebuttal closing argument;
- ***His*** failure to instruct the jury on the elements of his claim against Harvest; and
- ***His*** failure to include Harvest in the *substance* of the Special Verdict Form.

Mr. Morgan has provided no factual or legal basis for transferring this case back to Chief Judge Bell — especially given the fact that Harvest's Motion and Mr. Morgan's Motion for Attorney's Fees are the only issues remaining to be determined in this case. Just as the Supreme Court must rely on the record in an appeal, this Court need look no further than the record to decide Harvest's Motion.

Mr. Morgan erroneously relies on *Hornwood*, *Wolff*, *Winn*, and *Wittenberg* to support his contention that the trial judge is in a better position to decide Harvest's Motion, (*Id.* at 10:23-11:13); however, Harvest's Motion does not require this Court to weigh the credibility of any witnesses, to weigh any conflicting evidence, to review a prior decision for abuse of discretion, or even to make the ultimate determination on any issue of fact. *See Hornwood v. Smith's Food King No. 1*, 105 Nev. 188, 191-92, 772 P.2d 1284, 1286-87 (1989) (reversing and remanding to district court for assessment of consequential damages, as evidence still needed to be offered on this issue); *Wolff v. Wolff*, 112 Nev. 1355, 1359, 929 P.2d 916, 918-19 (1996) (recognizing that deference should be given to the trial judge's disposition of community property or an alimony award, because such determinations are reviewed for an abuse of discretion); *Winn v. Winn*, 86 Nev. 18, 20, 467 P.2d 601, 602 (1970) (finding no reason to supplant their determination for that of the trial judge in the absence of an abuse of discretion in the trial judge's equitable determination of alimony and disposition of community property); *Wittenberg v. Wittenberg*, 56 Nev. 442, 55 P.2d 619 (1936) (giving deference to the trial court's rulings where issues on appeal concerned the credibility of witnesses and the weight to be given to their testimony). Rather, Harvest's Motion merely seeks the dismissal with prejudice of all claims Mr. Morgan alleged (or could have alleged) in this action ***as a***

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result of his failure to prove any claim at trial, his failure to present any claim to the jury for determination, and his complete abandonment of any such claims.

Mr. Morgan offered no evidence at trial demonstrating that Mr. Lujan was acting within the course and scope of his employment at the time of the car accident — so there is no evidence to weigh on this issue. Mr. Morgan offered no witness testimony on the issue of whether Mr. Lujan was acting within the course and scope of his employment — so there is no need for the court to assess the credibility of witnesses. No party has filed a motion for new trial, so there are no issues to be reviewed for abuse of discretion. In sum, there is no reason that this Court is incapable of or unprepared for deciding Harvest's Motion.

Finally, Judge Bell's tenure as Chief Judge began on July 1, 2018. The order reassigning this action to this Court was issued on July 2, 2018. Therefore, Chief Judge Bell chose to reassign this action despite knowledge that post-trial motions were possible. Clearly, Chief Judge Bell did not believe that she needed to retain this action merely because she had been the presiding trial judge.

Mr. Morgan's Counter-Motion is nothing more than "judge-shopping" for what he hopes will be an untimely reconsideration of his Motion to Entry of Judgment. (Pl.'s Opp'n at 3:7-12.) There are no grounds for the transfer of this case; therefore, Harvest respectfully requests that Mr. Morgan's Counter-Motion be denied.

C. <u>Harvest Does Not Seek Entry of Judgment Pursuant to NRCP 49(a).</u>

Mr. Morgan asserts that Harvest is asking the court to reconsider its prior ruling on the inapplicability of Nevada Rule of Civil Procedure 49(a) and is judicially estopped from seeking entry of judgment pursuant to Rule 49(a). (*Id.* at 3:10:11, 11:18-12:20.) However, Harvest has not moved for entry of judgment pursuant to NRCP 49(a). This Court has already determined: (i) that, given the lack of jury instructions pertaining to claims against Harvest, Mr. Morgan's failure to include Harvest in the Special Verdict form was not a clerical error; and (ii) that Mr. Morgan failed to present his claim against Harvest to the jury for determination. (Ex. 1, at 9:8-20.) In light of this Court's decision, Harvest respectfully requests that this Court now dismiss with prejudice Mr. Morgan's abandoned claim against Harvest and that judgment be entered in favor of Harvest. Rule

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49(a) is not relevant to the relief Harvest seeks, as the Court has the inherent power and discretion to grant such relief.

D. Nothing in the Record Supports Mr. Morgan's Claim for Vicarious Liability, and Harvest Is Not Liable Merely Because Mr. Lujan Is an Employee Who Has Been Found to Have Been Negligent.

Mr. Morgan asserts that it would be a "mistake" to enter judgment in favor of Harvest Management, because "the jurors received significant evidence regarding the relationship between the Defendants which established the facts necessary to prove vicarious liability." (*Id.* at 14:13-16.) Notably, Mr. Morgan does not contend that sufficient evidence was presented to the jury to establish the facts necessary to prove ***negligent entrustment*** — the only claim actually pled against Harvest in Mr. Morgan's Complaint. Therefore, it is undisputed that Mr. Morgan either intentionally abandoned his claim for negligent entrustment or failed to prove the elements of this claim at trial. Thus, this claim must be dismissed with prejudice, and judgment should be entered in favor of Harvest on this claim as well as any other claim he could have alleged in this case.

In apparent acknowledgement of the fact that he never pled a claim for vicarious liability/respondeat superior, Mr. Morgan now asserts that this claim was "tried by consent." (*Id.* at 15:16-16:2.) However, in order for Harvest to expressly or impliedly consent to trial of an unpled claim for vicarious liability, it must have been clear that Mr. Morgan was attempting to prove such a claim at trial. *See Sprouse v. Wentz*, 105 Nev. 597, 602-03, 781 P.2d 1136, 1139 (1989) (holding that an unpled issue cannot be tried by consent unless a party has taken some action to inform the other parties that he is seeking such relief, and the district court has notified the parties that it intends to consider the unpled issue). The record of the discovery for and trial of this action belies Mr. Morgan's argument.

First, Mr. Morgan conducted no discovery relevant to a claim for vicarious liability. He never deposed Mr. Lujan or a single employee, officer, or other representative of Harvest. Moreover, Mr. Morgan never conducted any written discovery relating to whether Mr. Lujan was acting within the course and scope of his employment at the time of the accident. Rather, his interrogatories focused on background checks that Harvest performed prior to hiring Mr. Lujan and disciplinary actions Harvest had taken against Mr. Lujan in the five years preceding the accident —

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information relevant to a claim for negligent entrustment, not vicarious liability. (App. of Exs. to Harvest's Mot. for Entry of J., Vol. I, Ex. 4, at 6:25-7:2, 7:15-19.)

Second, Mr. Morgan failed to take any action at trial which would constitute notice of his intent to pursue a claim for vicarious liability. Specifically, his opening statement did not include any references to his intent to prove: (i) that Harvest was vicariously liable for Mr. Morgan's damages; and/or (ii) that, at the time of the accident, Mr. Lujan was acting within the course and scope of his employment with Harvest. (*Id.* at Vol. IV, at Ex. 11, at 126:7-145:17.) He never offered any evidence at trial regarding the issue of course and scope of employment. (*Id.* at Vol. I, Ex. 3, at 164:21-177:17, Ex. 6, at 4:2-6:1, 9:23-12:6, 13:16-15:6.) Like his opening statement, his closing argument failed to include any references to vicarious liability or the course and scope of employment. (*Id.* at Vol. IV, at Ex. 12, at 121:5-136:19, 157:13-161:10.) There were no jury instructions regarding the elements of a claim for vicarious liability or pertaining to the course and scope of employment. (*Id.* at Ex. 13.) Finally, in the Special Verdict Form, the jury was not asked to find that Harvest was vicariously liable for Mr. Morgan's injuries. (*Id.* at Ex. 14.) In sum, Mr. Morgan never provided Harvest, the Court, or the jury with notice that he intended to try a claim for vicarious liability as opposed to, or in addition to, a claim for negligent entrustment. As such, Harvest could not — and did not — expressly or impliedly consent to trial of a claim Mr. Morgan failed to raise in his pleadings.

Finally, even if this Court finds that a claim for vicarious liability was pled in the Complaint or tried by consent (which it was not), Mr. Morgan failed to offer any evidence at trial to prove this claim. Mr. Morgan attempts to explain this lack of evidence by erroneously asserting that "[v]icarious liability was not contested during trial." (Pl.'s Opp'n at 5:3-4.) First, the claim was never pled — Harvest need not dispute an unpled claim for relief. Second, Harvest denied the one and only allegation in Mr. Morgan's Complaint which referenced the phrase "course and scope of employment" — despite the fact that this allegation actually concerned the negligent entrustment of a vehicle to Mr. Lujan and not Harvest's alleged vicarious liability.[5] Moreover, it was Mr. Morgan

[5] *See* App. of Exs. to Harvest's Mot. for Entry of J., Vol. I, Ex. 1, at ¶ 9 (alleging "[o]n or about April 1, 2014, Defendants, [*sic*] were the owners, employers, family members[,] and/or operators of a motor vehicle, while in the course and scope of employment and/or family purpose and/or other purpose, which was entrusted and/or driven in such

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— not Harvest — that bore the burden of proof regarding a claim of vicarious liability. *Porter v. SW Christian Coll.*, 428 S.W. 3d 377, 381 (Tex. App. 2014) ("A plaintiff pleading respondeat superior bears the burden of establishing that the employee acted within the course and scope of his employment."); *Montague v. AMN Healthcare, Inc.*, 168 Cal. Rptr. 3d 123, 126 (Cal. Ct. App. 2014) ("The plaintiff bears the burden of proving that the employee's tortious act was committed within the scope of his or her employment.").

Mr. Morgan's assertion that he offered "sufficient evidence" to prove his claim for vicarious liability is based on the following:

- "Harvest Management and its corporate representative were identified as Defendants during trial." (Pl.'s Opp'n at 13:1-2, 13:4-8).[6]
    - However, the fact that Harvest is a defendant in this action is not admissible proof of any claim for relief, much less a claim for vicarious liability.
- Harvest and Mr. Lujan "were represented by the same counsel at both trials." (*Id.* at 13:2-3).
    - Given the lack of evidence regarding Mr. Lujan's history of incompetence, inexperience, and/or recklessness in driving motor vehicles, Harvest's and Mr. Lujan had aligned interests in defending against a claim for negligent entrustment of a vehicle. The fact of joint representation at trial is not admissible evidence offered to prove any element of a claim for vicarious liability.
- Harvest's "NRCP 30(b)(6) representative, Erica Janssen, sat at counsel's table throughout the second trial." (*Id.* at 13:3-4).

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a negligent and careless manner so as to cause a collision with the vehicle occupied by Plaintiff"); *see also* Ex. 2, at 2:8-9 (denying this allegation).

[6] Harvest's corporate representative at the second trial, Erica Janssen, was ***not*** a named Defendant in this case. Because Mr. Morgan fails to cite to any evidence in support of his assertion that Harvest's *corporate representative* was identified as a *defendant* in this action, Harvest assumes Mr. Morgan is actually referring to the introductions of counsel and parties to the jury venire, when counsel for the Defendants stated: "my client, Erica, is right back here." (App. of Exs. to Harvest's Mot. for Entry of J., at Vol. III, at Ex. 10, at 17:15-18.)

- Mr. Morgan pled a claim for negligent entrustment against Harvest, and Harvest's representative attended trial to defend against this claim. Her presence at the trial is not admissible evidence offered to prove any element of a claim for vicarious liability.

- Harvest's trial counsel informed the Court, during a bench conference, that Ms. Janssen was a corporate representative. (*Id.* at 13:9-22.)
  - The bench conference concerned the Court's confusion as to the identity of Ms. Janssen and clarification that she was not the individual defendant, Mr. Lujan — but, again, the fact that Harvest's corporate representative attended trial to defend against a claim for negligent entrustment is not admissible evidence offered to prove any element of a claim for vicarious liability.
- Both parties "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 . . . ." (*Id.* at 13:23-14:2 & n.27 (citing Tr. of Jury Trial (Apr. 2, 2018), at 47, 213, and 232).)
  - Mr. Morgan's contention is a complete mischaracterization of the record — and, again, has no bearing on the evidence offered at trial to prove the elements of a claim for vicarious liability. Questions posed to the jury venire are not evidence, nor is the jury's response to such questions. Regardless, the portions of the record cited by Mr. Morgan do not include any questions posed by counsel for ***Harvest***, and the questions asked by *Mr. Morgan's counsel* were not even tangentially related to vicarious liability.[7]

[7] On page 47 of the April 2, 2018 Transcript of Jury Trial, counsel for Mr. Morgan asked a member of the jury venire whether he or she was bothered by having responsibility for evaluating the Plaintiff's future medical needs, whether he or she was bothered by the fact that the jury's decision may affect the Defendants, and whether he or she had ever had any setbacks in life which he or she handled differently than expected—there were no questions posed regarding vicarious liability. (App. of Exs. to Harvest's Mot. for Entry of J., Vol. III, Ex. 10, at 46:25-47:25.)

On page 213 of the same trial transcript, counsel for Mr. Morgan asked a member of the jury venire whether he or she felt more people abused the legal system versus using it for the way it was intended, whether he or she could ignore worries about how the judgment was going to be paid, and whether thoughts of how the judgment would be paid by the defendant would influence his or her decision. This line of questioning came about because the member of the jury venire pondered how an individual defendant versus a large corporation could afford to pay a large judgment and

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- "During opening statements, both parties also addressed the fact that [Mr.] Lujan was acting in the course and scope of his employment at the time of the accident." (*Id.* at 14:3-4 & n. 28 (citing counsel for Mr. Morgan stating that Mr. Lujan was driving a shuttlebus, worked for a retirement community, was having lunch at a park and got into an accident with Mr. Morgan after getting into his shuttlebus to get back to work; and that "the actions of our driver were not reckless").)
    - Statements of counsel are not admissible evidence that can be offered to prove the elements of a claim for vicarious liability. Moreover, Harvest does not deny that Mr. Lujan is an employee of Harvest or that Harvest owned the shuttlebus involved in the accident. However, an employment relationship is *only one element* of a claim for vicarious liability, and these facts are just as relevant to a claim for *negligent entrustment* as they are to a claim of vicarious liability.
- Harvest's "NRCP 30(b)(6) representative also stated that she was testifying on behalf of Harvest [], was authorized to do so, and was aware of the fact that [Mr.] Lujan, the driver, was a Harvest [] employee." (*Id.* at 14:4-7.)
    - Harvest was a defendant in the action and appeared at trial to defend against a claim for negligent entrustment. The mere fact that Harvest's NRCP 30(b)(6) representative testified at trial in defense of this claim is not admissible evidence to prove the elements of a claim for vicarious liability. Moreover, Ms. Janssen's admission that Mr. Lujan was an employee of Harvest only proves *one element* of a claim for vicarious liability — and it is a fact that is equally relevant to a claim for negligent entrustment.

---

wondered whether the State pays such judgment (leading to increased taxes as a result). Mr. Morgan's counsel posed no questions regarding vicarious liability. (*Id.* at 212:25-214:3.)

Finally, on page 232 of the same trial transcript, counsel for Mr. Morgan asked a member of the jury venire to explain his or her past experience with lawsuits and how this past experience affected his or her view of lawsuits in general. This line of questioning came about after a juror disclosed that he had been deposed on behalf of Walgreens and CVS as a "corporate spokesperson." Mr. Morgan's counsel posed no questions regarding vicarious liability. (*Id.* at 231:23-233:3.)

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- Mr. Morgan "also established the employee-employer relationship between the Defendants by reading [Mr.] Lujan's testimony from the first trial into the record." (*Id.* at 14:7-9 & n.30.)
    - Again, Harvest has never denied that Mr. Lujan was an employee of Harvest, but this fact alone does not prove a claim for vicarious liability. The testimony referenced by Mr. Morgan merely states that, at the time of the accident, Mr. Lujan was employed by Montara Meadows; that Harvest is the corporate office for Montara Meadows; that Mr. Lujan was employed as a bus driver; and that the accident happened after Mr. Lujan pulled out of the parking lot at Paradise Park during his lunch break. (App. of Exs. to Harvest's Mot. for Entry of J., at Vol. I, at Ex. 6, at 195:7-196:10, Ex. 3, at 168:6-20.) Rather than proving vicarious liability, such facts actually establish that Mr. Lujan was ***not*** acting within the course and scope of his employment at the time of the accident because he was on his lunch break.
- In their closing arguments, "both parties' [*sic*] referenced responsibility and agreed that [Mr.] Lujan, Harvest['s] employee, should not have pulled in front of [Mr.] Morgan when [Mr.] Morgan had the right of way." (*Id.* at 14:9-11 & n.31.)
    - The transcript cited by Mr. Morgan in footnote 31 does not include the closing arguments of the parties; thus, Harvest assumes that Mr. Morgan meant to cite to the trial transcript for April 9, 2018. While defense counsel admitted, during a discussion of comparative negligence, that Mr. Morgan had the right of way at the time of the accident, counsel for Harvest never admitted that Mr. Lujan was acting in the course and scope of his employment at the time of the accident.

It is well recognized that vicarious liability is only imposed upon an employer when: "(1) the actor at issue is 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, 1225-26, 925 P.2d 1175, 1179, 1180-81 (1996) (holding that an employer is not liable if an

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employee's tort is an "'independent venture of his own'" and was "'not committed in the course of the very task assigned to him'") (quoting *Prell Hotel Corp. v. Antonacci*, 86 Nev. 390, 391, 469 P.2d 399, 400 (1970)). While it is undisputed that Mr. Lujan was an employee of Harvest at the time of the accident, and that he was driving a shuttle bus owned by Harvest when the accident occurred, these facts, in and of themselves, are not sufficient to prove that Mr. Lujan was acting within the course and scope of his employment at the time of the accident. This is particularly true in light of the unrefuted evidence offered by the Defendants that Mr. Lujan was on his lunch break when the accident occurred. Mr. Morgan failed to establish any evidence proving that Mr. Lujan was "on the clock" during his lunch break; that Mr. Lujan had returned to work when the accident occurred; that Mr. Lujan was transporting passengers or was on his way to pick up passengers when the accident occurred; that Mr. Lujan had "clocked in" after his lunch break or had no requirement to "clock in" and "clock out" as part of his employment with Harvest; that Harvest knew that Mr. Lujan was using the company shuttle bus during his lunch breaks; and/or that Harvest authorized such use of the shuttlebus.

In Nevada, it is well settled that "[t]he tortious conduct of an employee ***in transit to or from the place of employment*** will ***not*** expose the employer to liability . . . ." *Molino v. Asher*, 96 Nev. 814, 817-18, 618 P.2d 878, 879-80 (1980). While the issue of whether an employee was acting within the course and scope of his employment is generally an issue of fact, it may be resolved as a matter of law "where undisputed evidence exists concerning the employee's status at the time of the tortious act." *Rockwell*, 112 Nev. at 1225, 925 P.2d at 1180. Based on the unrefuted and undisputed[8] evidence that Mr. Lujan was at lunch at the time of the accident, and the lack of any evidence that Mr. Lujan was acting within the course and scope of his employment at the time of the accident, Mr. Morgan has not, as a matter of law, proven his alleged claim of vicarious liability against Harvest. Mr. Lujan's negligence cannot be "imputed" to Harvest based on the mere existence of an employer-employee relationship. (Pl.'s Opp'n at 16:6-8.) Therefore, this claim should be dismissed with prejudice and a judgment should be entered in favor of Harvest.

[8] In his opening statement, counsel for Mr. Morgan acknowledged that Mr. Lujan was at lunch when the accident occurred. (App. of Exs. to Harvest's Mot. for Entry of J., Vol. IV, Ex. 11, at 126:7-145:17.)

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III. CONCLUSION

For the foregoing reasons, Harvest respectfully requests that the Court deny Mr. Morgan's Counter-Motion to transfer this case; dismiss any and all claims that Mr. Morgan has alleged or could have alleged in this action; and enter judgment in favor of Harvest consistent with the proposed Judgment attached as Exhibit A to Harvest's Motion.

DATED this 23rd day of January, 2019.

BAILEY❖KENNEDY

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

I certify that I am an employee of BAILEY❖KENNEDY and that on the 23rd day of January, 2019, service of the foregoing **REPLY IN SUPPORT OF DEFENDANT HARVEST MANAGEMENT SUB LLC'S MOTION FOR ENTRY OF JUDGMENT; AND OPPOSITION TO PLAINTIFF'S COUNTER-MOTION TO TRANSFER CASE BACK TO CHIEF JUDGE BELL FOR RESOLUTION OF POST-VERDICT ISSUES** was made by mandatory electronic service through the Eighth Judicial District Court's electronic filing system and/or by depositing a true and correct copy in the U.S. Mail, first class postage prepaid, and addressed to the following at their last known address:

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EXHIBIT 1

EXHIBIT 1

TRAN

DISTRICT COURT
CLARK COUNTY, NEVADA
* * * * *

AARON MORGAN Plaintiff vs. DAVID LUJAN, et al. Defendants	.	CASE NO. A-15-718679-C DEPT. NO. XI **Transcript of Proceedings**

BEFORE THE HONORABLE ELIZABETH GONZALEZ, DISTRICT COURT JUDGE

HEARING ON PLAINTIFF'S MOTION FOR ENTRY OF JUDGMENT

TUESDAY, NOVEMBER 6, 2018

APPEARANCES:

FOR THE PLAINTIFF:	BRYAN A. BOYACK, ESQ. THOMAS W. STEWART, ESQ.
FOR THE DEFENDANTS:	DENNIS L. KENNEDY, ESQ. SARAH E. HARMON, ESQ. ANDREA M. CHAMPION, ESQ.
COURT RECORDER: JILL HAWKINS District Court	TRANSCRIPTION BY: FLORENCE HOYT Las Vegas, Nevada 89146

Proceedings recorded by audio-visual recording, transcript produced by transcription service.

employee, discusses the facts of the accident. Never does she bring up on cross or direct examination he was on a break, we aren't on the hook here, or any assertion of that. So this is kind of after the fact them trying to escape the clear liability that was presented, although it wasn't stated on the special verdict form, defendant Lujan, defendant Harvest Management. It was the defendant.

THE COURT: Is there any instruction on either negligent entrustment or vicarious liability in the pack of jury instructions?

MR. BOYACK: I don't believe so, Your Honor.

THE COURT: Yeah. Okay. Thanks.

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

MR. STEWART: Thank you, Your Honor.

MR. BOYACK: Thank you, Your Honor.

MR. KENNEDY: And just for purposes of clarification, that judgment will say that the claims against

Harvest Management are dismissed?

THE COURT: It will not, Mr. Kennedy.

MR. KENNEDY: Okay. Well, I'll just have to file a motion.

THE COURT: That's why I say we have to do something next.

MR. KENNEDY: Okay. I'm happy to do that.

THE COURT: I'm going one step at a time.

THE PROCEEDINGS CONCLUDED AT 9:13 A.M.

* * * * *

CERTIFICATION

I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE AUDIO-VISUAL RECORDING OF THE PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

AFFIRMATION

I AFFIRM THAT THIS TRANSCRIPT DOES NOT CONTAIN THE SOCIAL SECURITY OR TAX IDENTIFICATION NUMBER OF ANY PERSON OR ENTITY.

FLORENCE HOYT
Las Vegas, Nevada 89146

Florence M. Hoyt

FLORENCE M. HOYT, TRANSCRIBER

1/17/19

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DISTRICT COURT

CLARK COUNTY, NEVADA

AARON M. MORGAN, individually, Plaintiff, vs. DAVID E. LUJAN, individually; HARVEST MANAGEMENT SUB LLC; a Foreign Limited-Liability Company; DOES 1 through 20; ROE BUSINESS ENTITIES 1 through 20, inclusive jointly and severally, Defendants.	Case No.: A-15-718679-C Dept. No.: XI

NOTICE OF ENTRY OF ORDER REGARDING PLAINTIFF'S COUNTER-MOTION TO TRANSFER CASE BACK TO CHIEF JUDGE BELL FOR RESOLUTION OF POST-VERDICT ISSUES

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NOTICE OF ENTRY OF ORDER REGARDING PLAINTIFF'S COUNTER-MOTION TO TRANSFER CASE BACK TO CHIEF JUDGE BELL FOR RESOLUTION OF POST-VERDICT ISSUES

Please take notice that an Order Regarding Plaintiff's Counter-Motion to Transfer Case Back to Chief Judge Bell for Resolution of Post-Verdict Issues was entered in the above-captioned matter on the 7th day of February, 2019. A copy of the Order is attached hereto.

Dated this 7th day of February, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing **NOTICE OF ENTRY OF ORDER REGARDING PLAINTIFF'S COUNTER-MOTION TO TRANSFER CASE BACK TO CHIEF JUDGE BELL FOR RESOLUTION OF POST-VERDICT ISSUES** was submitted electronically for filing and/or service with the Eighth Judicial District Court on the 7th day of February, 2019. Electronic service of the foregoing document shall be made in accordance with the E-Service List as follows:[1]

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[1] Pursuant to EDCR 8.05(a), each party who submits an E-Filed document through the E-Filing System consents to electronic service in accordance with NRCP 5(b)(2)(D).

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DISTRICT COURT

CLARK COUNTY, NEVADA

AARON M. MORGAN, individually,

Plaintiff,

vs.

DAVID E. LUJAN, individually; HARVEST MANAGEMENT SUB LLC; a Foreign Limited-Liability Company; DOES 1 through 20; ROE BUSINESS ENTITIES 1 through 20, inclusive jointly and severally,

Defendants.

Case No.: A-15-718679-C
Dept. No.: XI

ORDER REGARDING PLAINTIFF'S COUNTER-MOTION TO TRANSFER CASE BACK TO CHIEF JUDGE BELL FOR RESOLUTION OF POST-VERDICT ISSUES

Plaintiff Aaron M. Morgan's Counter-Motion to Transfer Case Back to Chief Judge Bell for Resolution of Post-Verdict Issues came before this Court during its Chambers' Calendar on January 25, 2019. The Court, having reviewed the pleadings and papers on file and for good cause appearing, hereby makes the following Findings of Fact, Conclusions of Law, and Order:

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I.
FINDINGS OF FACT

1. On April 1, 2014, Plaintiff was injured after his vehicle collided with a Montara Meadows shuttle bus at the intersection of McLeod Drive and Tompkins Avenue.

2. On May 5, 2015, Plaintiff filed a complaint against the driver of the shuttle bus, David Lujan, and Mr. Lujan's employer, Harvest Management Sub LLC ("Harvest Management") in which he asserted three causes of action.

3. The case was randomly assigned to the Honorable Judge Bell, who presides in Department VII.

4. The case proceeded to a trial in November 2017, though Judge Bell declared a mistrial on day three.

5. A second trial took place in April 2018.

6. The parties disagree as to the events surrounding the special verdict form. According to Plaintiff, Judge Bell *sua sponte* prepared a special verdict form on the last day of trial which listed only Mr. Lujan in the caption and used the singular word "Defendant" throughout. In a discussion regarding the special verdict form, Judge Bell noted "I know it doesn't have the right caption," before asking counsel if the form "look[ed] sort of okay." Counsel for the parties voiced no concerns. The form was then inadvertently given to the jury without updating the language to list both Defendants.

7. By contrast, Harvest Management contends that Judge Bell provided the Parties with a sample special verdict form that she had recently used in a another trial involving similar issues, informing the Parties that it was "just what we had laying around" and that "it's just what we used in the last trial which was similar sort of." The only revision that Mr. Morgan requested be made to the special verdict form was for past and future medical expenses and past and future pain and suffering to be separated as different categories of damages. Mr. Morgan did not request any revisions to the caption or the other substantive provisions of the special verdict form that referred to a singular defendant or the sole claim of negligence.

8. Regardless of how the special verdict form was prepared, the jury ultimately completed the special verdict form to read that "Defendant" (written in the singular) was 100% at fault and Plaintiff was entitled to $2,980,980.00 for his damages.

9. On July 2, 2018, the case was reassigned to Department XI after Judge Bell assumed the role of Chief Judge for the Eighth Judicial District Court.

10. On July 30, 2018, Plaintiff filed a Motion for Entry of Judgment in which he urged this Court to enter a written judgment against both Defendants or, in the alternative, make an explicit finding in accordance with NRCP 49(a).

11. After Plaintiff's Motion for Entry of Judgment was fully briefed and argued, this Court denied Plaintiff's Motion and entered a Judgment on the Jury Verdict against only Defendant Lujan which totaled $3,046,382.72.

12. On December 21, 2018, Defendant Harvest Management filed a Motion for Entry of Judgment in which it argued that Plaintiff abandoned his claims against Harvest Management or, at the very least, failed to produce evidence at trial sufficient to prove a claim for vicarious liability / respondeat superior.

13. Plaintiff opposed the motion and filed a counter-motion in which he argued that Judge Bell is better equipped to rule upon the request for entry of judgment because Judge Bell presided over the earlier case proceedings, including the jury trial. In addition, Plaintiff argued that transferring the case back to Judge Bell is consistent with precedent which recognizes the special knowledge which presiding judges have regarding trials.

14. Defendant Lujan did not file a response to Plaintiff's counter-motion.

15. On January 23, 2019, Defendant Harvest Management filed a reply in support of its motion and an opposition to Plaintiff's counter-motion. With respect to the counter-motion, Harvest Management argued that Plaintiff was effectively seeking reconsideration because it was unhappy regarding this Court's previous decision. Further, Harvest Management argued that the transfer was not necessary because this Court has the entire record of the case and is capable of making a fully informed decision.

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16. This Court elected to consider the motion and counter-motion during its January 25, 2019, Chambers' Calendar.

17. On January 29, 2019, this Court issued a Minute Order detailing its decision to transfer Harvest Management's Motion for Entry of Judgment to Chief Judge Bell for resolution.

II.
CONCLUSIONS OF LAW

18. In addressing Plaintiff's counter-motion, the Court finds persuasive the Supreme Court of Nevada's decision in *Hornwood v. Smith's Food King No. 1*, 105 Nev. 188, 191, 772 P.2d 1284, 1286 (1989). There, the Supreme Court explained that the District Court that presides over a trial was in the best position to re-assess evidence and award consequential damages.

19. *Hornwood* is thus similar to a number of other Supreme Court decisions which recognize the unique insights and knowledge available to the judge who presides over a trial. *See, e.g., Winn v. Winn*, 86 Nev. 18, 20, 467 P.2d 601, 602 (1970) ("The trial judge's perspective is much better than ours for we are confined to a cold, printed record."); *Wittenberg v. Wittenberg*, 56 Nev. 442, 55 P.2d 619, 623 (1936) ("[M]uch must be left to the wisdom and experience of the presiding judge, who sees and hears the parties and their witnesses, scrutinizes their testimony and studies their demeanor.").

20. As relevant here, these precedent decisions support Plaintiff's argument that Judge Bell is in best position to address Defendant Harvest Management's Motion for Entry of Judgment because Judge Bell presided over all aspects of this case, including both trials.

21. Further, this Court finds that transfer of the pending motion to Judge Bell is both efficient and in the interest of justice.

III.
ORDER

For the reasons set forth above, **IT IS HEREBY ORDERED, ADJUDGED AND DECREED** that Plaintiff's Counter-Motion to Transfer Case Back to Judge Bell for Resolution of Post-Verdict Issues is **GRANTED IN PART.**

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IT IS FURTHER ORDERED that Defendant Harvest Management's Motion for Entry of Judgment shall be referred to Judge Bell for further proceedings and a decision.

IT IS FURTHER ORDERED that Plaintiff's remaining request(s) for relief are DENIED, and all other pending motions in this action and the remainder of this case continue to be assigned to Department XI.

IT IS SO ORDERED this 5 day of February, 2019.

DISTRICT COURT JUDGE

Respectfully submitted by:

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Approved as to form and content this 1st day of February, 2019.

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DISTRICT COURT

CLARK COUNTY, NEVADA

AARON M. MORGAN, individually, Plaintiff, vs. DAVID E. LUJAN, individually; HARVEST MANAGEMENT SUB LLC; a Foreign-Limited-Liability Company; DOES 1 through 20; ROE BUSINESS ENTITIES 1 through 20, inclusive jointly and severally, Defendants.	Case No. A-15-718679-C Dept. No. VII **SUPPLEMENT TO HARVEST MANAGEMENT SUB LLC'S MOTION FOR ENTRY OF JUDGMENT** Hearing Date: March 5, 2019 Hearing Time: 9:00 a.m.

During the hearing of Defendant Harvest Management Sub LLC's ("Harvest") Motion for Entry of Judgment, the Court requested transcripts of the settling of the jury instructions from the second trial in April 2018. Attached hereto, and as set forth below, are copies of the relevant transcript excerpts concerning the settling of jury instructions and the finalizing of the special verdict form:

/ / /

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/ / /

- On April 4, 2018[1], at pages 3:2-4:20, the Court and the Parties discussed a possible jury instruction regarding the first trial. The Court requested that Plaintiff's counsel submit a proposed instruction in writing.
- On April 4, 2018, at pages 45:1-46:7, the Court and the Parties discussed the fact that the jury instructions were settled during the first trial. The Court informed the Parties that it no longer had the instructions settled upon at the first trial and that a new set of proposed instructions should be submitted by the Parties. The Court also instructed the Parties that any objections raised to proposed instructions during the first trial would need to be asserted again.
- On April 4, 2018, at page 152:3-6, the Court informed the Parties that it would provide them with a new set of proposed instructions.
- On April 6, 2018,[2] at pages 56:18-58:25, the Court provided the Parties with a complete set of the proposed jury instructions. Plaintiff's counsel again stated that it wanted to include a proposed instruction relating to the first trial, and the Court instructed Plaintiff's counsel to submit the proposed instruction in writing. Finally, the Court informed the Parties that a reference to past and future vocational loss should be removed from Instruction No. 20, because there was no wage loss claim in the case.
- On April 6, 2018, at page 100:1-108:5, the Court and the Parties settled the jury instructions. The Court went through every proposed instruction, and there were no proposed instructions as to either negligent entrustment or vicarious liability. The Parties revised Instruction No. 13, because there were no Requests for Admission in this case. The Court decided to include Plaintiff's proposed instruction regarding the first trial. There was brief discussion about the instruction concerning the playback or re-reading of a witness's testimony. The Court specifically inquired as to whether the Parties had any other proposed instructions, and both Parties acknowledged that they

[1] A true and correct copy of excerpts from the April 4, 2018 Transcript of Jury Trial are attached as Exhibit 1.

[2] A true and correct copy of excerpts from the April 6, 2018 Transcript of Jury Trial are attached as Exhibit 2.

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did not. Both Parties also acknowledged that they had no other objections for the record. Finally, the Court informed the Parties that it had a sample special verdict form from a recent trial that could be used.

- On April 6, 2018, at pages 206:20-207:6, the Court provided the Parties with the final set of jury instructions.
- On April 9, 2018,[3] at pages 3:11-4:2, the Court confirmed that it had provided the Parties with a complete set of the final jury instructions, and it was discovered that the verdict form had been mistakenly omitted from this set.
- On April 9, 2018, at pages 5:20-6:2, the Court provided the Parties with a sample special verdict from another recent trial. The Court informed the Parties that the caption was incorrect and that it may not be correct as to the damages being sought, but asked if the form looked "okay."
- On April 9, 2018, at page 116:7-24, Plaintiff's Counsel informed the Court that it wanted to make one change to the special verdict form. Plaintiff's counsel requested that past and future medical expenses and past and future pain and suffering be split up as separate categories of damages. That was the only revision requested, and the Court approved the revision.
- On April 9, 2018, at page 117:3-24, there was an objection lodged to Jury Instruction No. 26, regarding the Court's prior ruling on a motion for summary judgment.

DATED this 5th day of March, 2019.

BAILEY❖KENNEDY

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

Attorneys for Defendant
HARVEST MANAGEMENT SUB LLC

[3] A true and correct copy of excerpts from the April 9, 2018 Transcript of Jury Trial are attached as Exhibit 3.

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CERTIFICATE OF SERVICE

I certify that I am an employee of BAILEY❖KENNEDY and that on the 5th day of March, 2019, service of the foregoing **SUPPLEMENT TO HARVEST MANAGEMENT SUB LLC'S MOTION FOR ENTRY OF JUDGMENT** was made by mandatory electronic service through the Eighth Judicial District Court's electronic filing system and/or by depositing a true and correct copy in the U.S. Mail, first class postage prepaid, and addressed to the following at their last known address:

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EXHIBIT 1

RTRAN

DISTRICT COURT

CLARK COUNTY, NEVADA

AARON MORGAN, Plaintiff, vs. DAVID LUJAN Defendant.	CASE#: A-15-718679-C DEPT. VII

BEFORE THE HONORABLE **LINDA MARIE BELL**, DISTRICT COURT JUDGE

WEDNESDAY, APRIL 4, 2018

RECORDER'S TRANSCRIPT OF HEARING
CIVIL JURY TRIAL

APPEARANCES:

For the Plaintiff: DOUGLAS GARDNER, ESQ.
DOUGLAS RANDS, ESQ.

For the Defendant: BRYAN BOYACK, ESQ.
BENJAMIN CLOWARD, ESQ.

RECORDED BY: RENEE VINCENT, COURT RECORDER

Las Vegas, Nevada, Wednesday, April 4, 2018

MR. CLOWARD: The first thing is the prior trial, in the event that that comes up, we feel like there should be some sort of an instruction that you could give the jurors now. Just, hey, there was a prior trial, you know, that something happened and, you know, this is the second time or something. I mean, we don't want to indicate that there was anything negative.

THE COURT: Generally, how I have handled that in the past on the few occasions this has come up is to just simply say you previously testified in this matter. I mean, we have got this [indiscernible] testimony as well, and so we treat it really kind of like deposition testimony because obviously you're entitled to impeach someone if they something different than they did in their testimony in the first trial. But if you just say you testified in this matter previously, I don't think that it is necessary to get into any particular detail about that further than that.

MR. CLOWARD: Yeah. I guess a concern that we would have is that if the jurors think that, you know, Aaron's already collected on this and that this is just a second lawsuit kind of a thing which, you know, that wouldn't be accurate. And so we'd hoped to get just a simple instruction that, you know, we had a -- there's a reason we give these instructions. In that case, there was an issue -- or in that trial there was an issue and so this is the second trial on this matter, it's still not complete, and that's it.

And then, if we get into the whole prior trial thing, there won't be the jurors thinking that there was some sort of conclusion for one side or the other.

THE COURT: Well I just don't know why we could into the whole prior trial thing at all, Mr. Cloward. I mean, can't we just --

MR. GARDNER: I don't -- yeah. In fact, I don't mean to bring up the prior trial. We could call it sworn testimony if we want to refer to the trial transcript -- just as sworn testimony.

THE COURT: It would be very similar to the way that we handle it when somebody makes a sworn statement to an insurance adjuster. We don't say it's a sworn statement to an insurance adjuster, we just say you gave a statement in this case previously.

MR. BOYACK: It was brought up yesterday.

UNIDENTIFIED SPEAKER: Yeah, twice yesterday, they said --

MR. CLOWARD: Yeah, it was brought up, plus --

UNIDENTIFIED SPEAKER: -- prior trial.

MR. CLOWARD: -- I believe that it's possible --

THE COURT: All right. Well if you want to draft an instruction, I'm happy to look at Mr. Cloward.

MR. CLOWARD: Okay. Will you do that, Bryan.

MR. BOYACK: Yep.

MR. CLOWARD: Thanks. And thank you, Your Honor, for that consideration.

And a couple of other things. The first trial that we had, there was no discussion of liens or health insurance. I just assumed that that was because the case law, the *Pizarro* case at 133 Nev. Adv. Op., talks about how, you know, if a lien is recourse versus non-recourse, the relevance is really minimal.

THE COURT: I have at least an initial draft set of instructions. I still don't have any instructions from the Defense. Mr. Rands?

MR. RANDS: Your Honor, in the last trial, I think we settled the instructions.

THE COURT: I understand, but I don't have them. I didn't keep them from the last trial.

MR. BOYACK: Yeah, we're working on them.

THE COURT: And I don't have them. As I mentioned the first day, my assistant retired and so I don't have access to her [indiscernible] so I don't have them.

MR. RANDS: Counsel gave me his set. I'm going to compare it with mine. I think we've got it pretty much settled.

THE COURT: Well the set you provided me was missing some, like, critical instructions, so.

MR. BOYACK: We know. We know, and I understand. The copies that were emailed were incorrect.

THE COURT: Okay. Well just get me whatever because I would like to get those finalized.

MR. RANDS: I got his set this morning. I'll compare it with ours --

THE COURT: That's the draft that I have currently.

MR. RANDS: -- and I think we've got them settled.

THE COURT: Okay. Well, great.

MR. RANDS: So rather than give you ours and then have to deal with --

THE COURT: Well, if there's any -- the other thing is if there are any that there were objections to or whatever last time, they're not going to be in the record. So if there's any that you want that you are not agreeing on, I need those, too.

MR. RANDS: Okay.

THE COURT: So we basically just need to redo it.

MR. RANDS: Will do.

[Recess at 12:16 p.m.]

THE MARSHAL: Please rise for the jury.

[Jury in at 1:47 p.m.]

THE MARSHAL: Please be seated.

THE COURT: We're back on the record in Case number A718679, Morgan versus Lujan. Let the record reflect the presence of all of our jurors, counsel, and parties.

Mr. Cloward, I'm sorry, go ahead, please.

MR. CLOWARD: No problem. Thank you, Your Honor.

BY MR. CLOWARD:

Q So, Dr. Muir, if you'll kind of I guess just kind of we'll go through -- I think the last question was kind of the thought process in arriving to the ultimate conclusions that you have today and so forth.

A Certainly. On the cervical spine, in summary, based upon the patient's symptoms of a sharp stabbing pain, which is consistent with joint, based upon the hypermobility at C5-C6, based upon the physical examination of extension being more painful than flexion, which is consistent with a joint problem, based upon the symptoms of -- of referred pain in the

I'm hoping not to have everybody waiting today -- like they were today. So I did find the --

MR. CLOWARD: Instructions?

THE COURT: Yeah. I did find those, so I'll go through those again and get you a new -- you can just recycle whatever I gave you. I'll go through and give you a new set.

MR. GARDNER: Your Honor, I hope I didn't make a big mistake. I've been telling a couple of my witnesses Monday. Should I not do that?

THE COURT: My hope was to finish this by Friday, but I know that we are behind. So I don't know the answer to that. I mean, we'll see. We have Dr. Cash --

And how long is Dr. K -- I'm never going to get her name.

MR. CLOWARD: Kittusamy.

THE COURT: Yeah. Never going to get it.

MR. CLOWARD: Well, the concern is, is that we were -- we wanted to get Dr. Coppel yesterday.

THE COURT: Right.

MR. CLOWARD: So he got pushed 'til tomorrow. We're going to -- it's going to be a heavy, heavy lift, but we're going to try to get all three of those doctors done.

THE COURT: Okay.

MR. CLOWARD: Which will mean that we'll have to finish Aaron on Friday.

THE COURT: Okay.

EXHIBIT 2

RTRAN

DISTRICT COURT

CLARK COUNTY, NEVADA

AARON MORGAN, Plaintiff, vs. DAVID LUJAN Defendant.	CASE#: A-15-718679-C DEPT. VII

BEFORE THE HONORABLE **LINDA MARIE BELL**, DISTRICT COURT JUDGE

FRIDAY, APRIL 6, 2018

RECORDER'S TRANSCRIPT OF HEARING
CIVIL JURY TRIAL

APPEARANCES:

For the Plaintiff: BRYAN BOYACK, ESQ.
BENJAMIN CLOWARD, ESQ.

For the Defendant: DOUGLAS GARDNER, ESQ.
DOUGLAS RANDS, ESQ.

RECORDED BY: RENEE VINCENT, COURT RECORDER

Tell me your plan.

Oh, there it is.

MR. GARDNER: Well, we pushed our experts to Monday. I can call them to see if we can get them here today, but I don't know if we can do that. But I do intend to call the Plaintiff and Erica, and then our accident reconstructionist and our doctor. But --

THE COURT: Mr. Gardner, I told you two days ago to have them here today.

MR. GARDNER: I'm sorry, I misunderstood.

THE COURT: I mean, I --

MR. GARDNER: I'll see if I can get them.

THE COURT: Because, I mean, we knew that they were going to finish in the morning today.

MR. GARDNER: I'll contact them, Your Honor.

THE COURT: All right. All right, folks. 10:30.

MR. CLOWARD: Okay. Thanks.

[Recess at 10:25 a.m.]

THE COURT: Did you both get -- I had put them up here but I didn't tell you -- the new set of jury instructions.

MR. RANDS: I grabbed those and distributed them yesterday.

THE COURT: Right. Thank you, Mr. Rands.

MR. RANDS: [Indiscernible].

THE COURT: So it is not exactly what we had decided upon before. There was just a couple of additional instructions and they're reordered just a hair. But I incorporated what -- there were a few

instructions from the set from --

MR. CLOWARD: Than last night?

THE COURT: Yeah.

MR. CLOWARD: Okay.

THE COURT: So -- that I had incorporated. So just if there's any additional instructions that anybody intends to propose, let me know.

MR. CLOWARD: I think there's one instruction that we wanted to propose just regarding that -- the trials.

THE COURT: That's fine. So just make sure that you get it -- you get it emailed to me.

MR. RANDS: Yeah, I've gotten a copy of their -- and we've talked a little bit with Bryan before about that. But now you've brought the other one up, so I guess we're going to have to have them both.

THE COURT: So just make sure I get -- if you could get them in writing to me, because I would like to go --

MR. CLOWARD: Do you have it in writing?

MR. RANDS: The only other issue was to --

THE COURT: -- through them maybe around lunchtime.

MR. CLOWARD: Your Honor, I have a handwritten --

THE COURT: That'll work.

MR. CLOWARD: -- apparently from Mr. Boyack.

MR. BOYACK: Yes.

MR. CLOWARD: Because Mr. Boyack's --

THE COURT: We'll see how Mr. Boyack's writing is.

MR. CLOWARD: Ask him to type it up.

MR. BOYACK: Well --

MR. RANDS: Instruction Number 20, Your Honor --

MR. CLOWARD: I'm throwing you under the bus.

MR. RANDS: Instruction Number 20 also has past and future vocational loss --

THE COURT: Oh. I thought I fixed that.

MR. RANDS: I'm going to go find Mr. Gardner. I'll be right back.

THE COURT: Oh, I see. You know what? It's -- it was an editing error on my part. I circled it, but I didn't cross it out so --

MR. BOYACK: Oh, okay.

THE COURT: So my assistant would have had

MR. BOYACK: Number 29?

THE COURT: -- no way to figure out what I was trying to do there.

MR. BOYACK: On Number 29 that --

THE COURT: Yeah.

MR. BOYACK: Okay, perfect.

THE COURT: I just -- I screwed it up.

MR. BOYACK: Well, we're all --

THE COURT: I knew I was taking it out, I just --

MR. BOYACK: Ben's pointed out my screw-ups, plenty of those.

THE COURT: I wasn't very clear on that.

Do you want to get them back in?

THE MARSHAL: Please rise for the jury.

[JURY IN AT 10:35 A.M.]

THE MARSHAL: Please be seated.

THE COURT: Back on the record in case number A718679, Morgan versus Lujan. [Indiscernible] present, all of our jurors present.

All right. Mr. Gardner, please call your first witness.

[PAUSE]

[COUNSEL CONFER]

THE COURT: All right. Sir, come back on up, please. Go ahead and have a seat. Having been previously sworn, I'll remind you that you are still under oath.

Mr. Gardner, whenever you are ready.

AARON MORGAN

[having been called as a witness and having been previously sworn, testified further as follows:]

DIRECT EXAMINATION

BY MR. GARDNER:

Q Hello, Aaron.

A Hello.

Q We meet again.

A Yes.

Q I don't know why you left at -- watching your girlfriend testify. Every man in America would like to see his wife or girlfriend up on the stand like that. You can find out a lot of information.

But where are you working now?

come back at -- you know what? I'm going to send the jury out to do the instructions right now and then come back at 12:45. Yeah, so that's what I'll do.

MR. GARDNER: Okay.

MR. CLOWARD: So come back at 12:45?

THE COURT: We're going to break for lunch and let's have the jury come back at 12:45, but we're going to do the jury instructions right now --

MR. CLOWARD: Oh, yeah.

THE COURT: -- so we're going to take five, ten minutes.

MR. CLOWARD: Good idea. Thanks.

THE COURT: All right.

[Bench conference ends at 11:33 A.M.]

THE COURT: All right, folks. We're going to go ahead and break for lunch. During this break you are admonished not to talk or converse among yourselves or with anyone else on any subject connected with this trial or read, watch or listen to any report of or commentary on the trial or any person connected with this trial by any medium of information, including without limitation, newspapers, television, the Internet and radio or form or express any opinion on any subject connected with the trial until the case is finally submitted to you. Remind you not to do any independent research. We're going to come back at 12:45.

THE MARSHAL: Please rise for the jury.

[Jury out at 11:33:30 A.M.]

THE COURT: All right, folks. Let's just run through the jury instructions here real quick. So, all right. We have Number 1, it is now my duty as judge. Also, I have probably changed the -- I know we had a set. We've had some different things. There may be just some minor changes to remove pronoun references in the instructions. I don't give that masculine or feminine instruction that was submitted in the second group. So and if you happen to see something that isn't, let me know. Somehow those pronouns sneak their way into the instructions. But I think that they're in pretty good shape in that regard.

So 1 is it is now my duty as judge;

2, if in these instructions any rule, direction or idea;

3, if during this trial I have said or done anything;

4 was not submitted at any point in this case, but it's an instruction we generally give, the sympathy --

MR. CLOWARD: Yeah, that's fine. Fine with me.

THE COURT: Do you want -- is everybody fine with that?

MR. CLOWARD: Yeah.

MR. GARDNER: Yeah.

MR. RANDS: There's a spot that usually has that in there.

MR. GARDNER: Yeah, that's fine.

THE COURT: Yeah. It just wasn't. For whatever reason, it wasn't.

MR. GARDNER: Okay.

THE COURT: 5, one of the parties in the case is a

corporation.

MR. RANDS: Okay. I must have the wrong set.

THE COURT: Yeah, I apologize. We've had a few different.

MR. CLOWARD: I had my four exhibit binders that I've been -- so we just reprint them many times, and I have notes in --

MR. RANDS: Mine was --

THE COURT: One of the parties in this case is a corporation;

6 was not included by anyone, but I would like to give it and it's just you can't communicate with anybody by any electronic means until the verdict's returned.

MR. CLOWARD: Yeah, we're happy with that. Good.

THE COURT: 7, you must decide all questions of fact from this case. The instruction submitted did not have the last line that says "including the Internet or other online services." I assume everybody's fine with that.

8, although you are to consider only the evidence in reaching a verdict;

9, the evidence which you are to consider. This instruction was submitted with the line "if the parties stipulate to the existence of a fact you must accept that." That's actually a separate instruction so I removed that line.

10, there are two kinds of evidence, direct and circumstantial;

11, in determining whether any proposition has been proved;

12, if the parties -- if Counsel for the parties have stipulated to any fact.

And then 13 is the deposition interrogatory request for admission instruction, so I don't -- I can't recall if there's been any reference to an interrogatory request for admission.

MR. RANDS: Interrogatory request for admission --

MR. CLOWARD: We did the rogs, not the RFAs, though, the rogs.

THE COURT: So you want me to strike the last paragraph?

MR. RANDS: Yeah.

THE COURT: All right.

MR. GARDNER: Sure.

MR. CLOWARD: Yeah.

THE COURT: 14, the credibility or believability of a witness;

15, discrepancies in a witness's testimony;

16, an attorney Has a right to interview a witness;

17, a person who has specialized knowledge, skill, experience;

18, a question has been asked;

19, an expert witness has testified;

20, whenever in these instructions I state that the burden;

21, the preponderance or weight of evidence;

22, the Plaintiff seeks to establish liability in a claim of negligence;

23, the Plaintiff has the burden to prove;

24, when I use the word "negligence";

25, a proximate cause;

26, it has already been determined. All right. You know what? We have this instruction about the prior trials. I would probably put it in -- the next in line just --

MR. RANDS: Okay.

THE COURT: -- since there's some specific information there. I don't know that there's a great place to put this anywhere, but --

MR. BOYACK: Correct. No, I think --

THE COURT: All right. So this is the instruction that's proposed by the Plaintiff. There have been two prior trials previously held in this matter. The first trial was set in April 2017 but needed to be rescheduled on the first day for an emergency; the second trial was in November 2017 and lasted for three days but was not completed and no verdict was reached. You should not make any opinions or conclusions based on the fact that prior trials were held -- were held in this case. All right. Any objection from the --

MR. RANDS: Well, I kind of objected to it -- not objected to it. We talked beforehand that I didn't think it was necessary to put that first issue in, but then I guess Mr. Cloward did raise that in his --

THE COURT: All right. So I'm going to go ahead and give that as -- we'll make that 27.

MR. RANDS: Okay.

THE COURT: The next is Plaintiff may not recover damages. It's the comparative negligence instruction. I'm going to make that 28.

MR. RANDS: Uh-huh.

THE COURT: You are not to discuss or even consider, make that 29. Oh, wait. Wait, wait, wait. I might not have gotten to it yet. Let me see. Ah.

In determining the amount of losses, I would make that 30, and then I'm going to take out that three.

MR. CLOWARD: Okay.

THE COURT: That was just my missed error and how I edited it. I circled it instead of crossed it out.

31, no definite method or standard of calculation;

32, if you find Plaintiff suffered injuries;

33, according to the table of mortality;

34, whether any of these elements have been proven;

35, the Court has given you instructions;

36, if during your deliberation --

MR. RANDS: Just as a side note, in addition to issues that I don't like with the jury questions, this is another one I don't like because it kind of gives them the idea that they may be able to do it.

THE COURT: You know what? Actually, Mr. Rands, that's

not my experience. The one time we did not -- the one time that I didn't give this instruction -- we've never had a jury ask for a playback, except for the one time we didn't --

MR. RANDS: Didn't do it? Okay.

MR. CLOWARD: And then they asked for it?

THE COURT: Then they asked for a bunch of stuff. So, I mean, I think telling them, like, we don't encourage that is, at least in my experience, that's been helpful and doesn't give them ideas, because when we didn't tell them they definitely got ideas.

MR. RANDS: They did it. Okay. Mine's different, but, you know, I think sometimes when you put it in their mind they think, oh, yeah, we could -- we might get a reading.

THE COURT: 37, it is your duty as jurors;

38, when you retire to consider your verdict, and;

39, now you will listen.

Are there any other proposed instructions that the Court has not considered?

MR. CLOWARD: No, Your Honor.

MR. RANDS: Not from the Defense, Your Honor.

THE COURT: Okay. Any objections that have not been placed on the record?

MR. RANDS: Nope.

THE COURT: Great. So we'll get -- I'll get those couple changes made and then we'll get you, each side, a final set after lunch.

MR. RANDS: A clean set. Okay. Thank you.

THE COURT: And then I don't know if I have a verdict form or not, but since this is like my sixth car accident trial in a row, I have one from last year that will work great for this, I will just note that.

MR. CLOWARD: That would be perfect.

THE COURT: We'll put that together and then --

MR. RANDS: Will it -- it will include a comparative?

THE COURT: Yeah.

MR. RANDS: Okay.

THE COURT: This is my sixth car accident trial since the beginning of the year, and two of them were two weeks long.

MR. RANDS: Really?

MR. CLOWARD: Geez.

THE COURT: Okay. So --

MR. RANDS: Was Mr. Cloward involved in those?

THE COURT: You didn't have any of the ones that we had this year, have you --

MR. CLOWARD: That was last year.

THE COURT: That was last year.

MR. CLOWARD: Last year.

THE COURT: It's been different lawyers in every single one.

MR. RANDS: Really?

THE COURT: So I had Mr. Prince and I had -- they really

just all blur together. It's awful. I can't remember. But, no, not Mr. Cloward.

MR. CLOWARD: All right. Thank you, Your Honor.

MR. RANDS: Thanks, Judge.

THE COURT: All right.

[Recess at 11:44 A.M.]

[Outside the presence of the jury]

MR. GARDNER: Your Honor, I do have a witness coming. I expected him about 10 minutes ago. Could we -- I know it's asking a lot, but --

THE COURT: Well, yeah. Just have them hold off.

THE MARSHAL: Okay.

THE COURT: Yeah.

MR. GARDNER: Thank you. Appreciate that.

[Pause]

MR. GARDNER: In fact, if it would be all right, I'll go out and wait for him, so he --

THE COURT: Yeah.

MR. GARDNER: -- comes in the right place. Oh. He's right there.

THE COURT: Right.

[Pause]

MR. GARDNER: Your Honor, he's here.

THE COURT: All right.

[Pause]

THE COURT: All right, folks. So here is our plan. We have a doctor who's scheduled to come at 9:00 on Monday morning. At this point, the parties can obviously change their minds because we're not done with the case, but at this point I anticipate that will be our last witness unless something happens. We'll finish up with the doctor's testimony. I would anticipate that I would then read you the jury instructions. We'll break for lunch, and then have closings immediately after lunch tomorrow and get you the case to deliberate by midafternoon. So we'll reconvene Monday at 9:00 a.m.

During this break you are admonished not to talk or converse among yourselves or anyone else on any subject connected with this trial, or read, watch, or listen to any report or commentary on the trial or any person connected with this trial by any media information including, without limitation, newspapers, television, internet, and radio or form or express any opinion on any subject connected with the trial until the case is finally submitted to you. I remind you to not do any research. Everybody have a good weekend, we'll see you Monday.

THE MARSHAL: Please rise.

[Jury out at 4:20 p.m.]

THE COURT: Mr. Boyack?

MR. BOYACK: Yes.

THE COURT: I have final sets of instructions I'm just going to give you. One for Mr. Gardner, one for you.

MR. BOYACK: Thank you.

THE COURT: This is mine.

MR. BOYACK: This is the new set of instructions.

THE COURT: That's the final set. So if you have any other ones, get rid of them. All right, anything else we need to take care of this evening?

UNIDENTIFIED SPEAKER: No, Your Honor.

MR. GARDNER: No, Your Honor.

MR. CLOWARD: Thank you, Judge. Well, I think he probably said enough. But I would just say I'm not sure whether Dr. Baker stated his opinions to a reasonable degree of probability. But I don't know. I just, I'm not moving to strike or anything, I'm just --

THE COURT: All right. I wasn't entirely clear on that myself, Mr. Cloward. But I mean, I think he --

MR. CLOWARD: I would be curious to review the transcript. But I think he kind of --

THE COURT: Well, what he said was can you tell me what that means. And then he said that they were -- that he used methods that were generally accepted in his field, which to me is the same thing. Yes, I mean, he didn't use the magic language that, you know, the magic legal language. But I think that what he said afterwards was really the same thing, that it was, you know --

MR. CLOWARD: Okay. Can we leave the boards here?

THE COURT: Oh yes, you can leave everything. Nothing's going to happen here over the weekend.

THE MARSHAL: We're going to [indiscernible] this portion of the courtroom. [Indiscernible] to do this, so just leave your boxes and your

EXHIBIT 3

RTRAN

DISTRICT COURT

CLARK COUNTY, NEVADA

AARON MORGAN, Plaintiff, vs. DAVID LUJAN Defendant.	CASE#: A-15-718679-C DEPT. VII

BEFORE THE HONORABLE **LINDA MARIE BELL**, DISTRICT COURT JUDGE

MONDAY, APRIL 9, 2018

RECORDER'S TRANSCRIPT OF HEARING
CIVIL JURY TRIAL

APPEARANCES:

For the Plaintiff: BRYAN BOYACK, ESQ.
BENJAMIN CLOWARD, ESQ.

For the Defendant: DOUGLAS GARDNER, ESQ.
DOUGLAS RANDS, ESQ.

RECORDED BY: RENEE VINCENT, COURT RECORDER

Las Vegas, Nevada, Monday, April 9, 2018

THE COURT: Good morning, Mr. Rands. How was your weekend? It's Monday.

MR. RANDS: Come on. It's Monday during trial. That's how my weekend was. I apologize, Your Honor. I just got a call from Mr. Gardner. He's almost here, but --

THE COURT: All right. Do you have your witness?

MR. RANDS: Dr. Sanders is sitting in the --

THE COURT: Excellent.

MR. RANDS: I apologize I wasn't here Friday afternoon. I had a matter in Reno I had to take care of. But did we get a complete copy of the jury instructions?

MR. CLOWARD: Yes.

MR. RANDS: The complete set.

MR. CLOWARD: Yes.

THE COURT: Yes.

MR. RANDS: Because there was those couple of additions.

MR. CLOWARD: Yeah.

THE COURT: Yeah. But we got -- Mr. Gardner should have it, but if you don't, do you need another one?

MR. RANDS: Did that include the jury forms, the verdict forms?

THE COURT: No. Oh, no. I forgot to ask Sylvia to do that. No. I'll get those right now.

MR. RANDS: Okay. Thank you. I was working off the last greatest set, but I'm sure it's not the last one because I didn't have the new

one. If Gardner has them, I'll grab them from him.

THE COURT: We'll get you a new one.

MR. CLOWARD: And then, Your Honor, I was hoping to have Dr. Sanders instructed outside the presence of what he's allowed to talk about and what he's not allowed to talk about. His report handed in 2016. We've never gotten a supplemental report. He also never reviewed the films in the case. He specifically set out in his report, he said, hey, I'd like to see the films. Those were never provided, so we never did a supplement. So anything past 2016, I don't think would be appropriate for him to discuss. Additionally, he never discussed the second car crash and so any mention of that I think would be off limits as well. So I was hoping that --

THE COURT: All right. That's fine.

MR. CLOWARD: Okay.

THE COURT: Can the doctor come in? He doesn't have to come all the way up. Good morning. How are you? So I just wanted to touch base with you before we call you to testify. As I understand it, your last report was sometime in 2016.

THE WITNESS: I think so, yes.

THE COURT: Okay. And you never addressed -- there was some subsequent accident that was never addressed by you.

THE WITNESS: Correct.

THE COURT: Okay. So just we just need to make sure that your testimony is limited to the things that you put in your report and not anything that you've learned after that's not in the report.

THE WITNESS: Correct. In my report, I think the patient did

mention there was a subsequent motor vehicle accident and he said he was fine and I never pursued that.

THE COURT: All right. So, anything else, Mr. Cloward?

MR. CLOWARD: Okay. No. I just wanted to make sure that the doctor was aware of that.

THE COURT: Great. Sir, if you want to just have a seat right here we're going to bring the jury in and then we'll have you come up to the stand once they're in. Just wherever, wherever you like.

MR. RANDS: Mr. Gardner just texted me. He's in the elevator, so he'll be here.

THE COURT: Good. In 10 or 15 minutes he'll be here.

MR. RANDS: Ten or fifteen minutes, exactly, the elevators here.

[Pause]

MR. GARDNER: Your Honor, I'm sorry.

THE COURT: This one's for Mr. Gardner.

All right. Can you bring in the jury? All right. Mr. Rands, here's your jury instructions.

MR. RANDS: Thank you, Your Honor.

THE COURT: Take a look and see if -- will you guys look at that verdict form? I know it doesn't have the right caption. I know it's just the one we used the last trial. See if that looks sort of okay.

MR. RANDS: Yeah. That looks fine.

THE COURT: I don't know if it's right with what you're asking for for damages, but it's just what we used in the last trial which was similar

sort of.

THE MARSHAL: Please rise for the jury.

[Jury in at 9:13 a.m.]

THE COURT: We're back on the record in case number 8718679, Morgan v. Lujan. [indiscernible] Counsel and parties. Good morning, everyone. I hope you had a good weekend.

Mr. Gardner and Mr. Rands, if you'll please call your next witness.

MR. GARDNER: Yes, Dr. Sanders.

THE MARSHAL: Doctor, up here, please. If you would remain standing, raise your right hand, and face the clerk, please.

STEVEN SANDERS

[having been called as a witness and being first duly sworn testified as follows:]

THE COURT: Good morning, sir. Go ahead and have a seat, please. And if you'll please state your name and spell it for the record.

THE WITNESS: Steven Sanders, S-T-E-V-E-N, Sanders, S-A-N-D-E-R-S.

THE COURT: Thank you. Whenever you're ready, Mr. Gardner.

DIRECT EXAMINATION

BY MR. GARDNER:

Q Good morning, Doctor.

A Good morning.

Q Thank you for being here sincerely. Why don't you tell the jury

MR. GARDNER: Yes.

THE COURT: All right.

MR. GARDNER: It is.

THE COURT: So when we come back we'll be -- do you have any rebuttal witnesses, Mr. Cloward?

MR. CLOWARD: No.

THE COURT: Great. So when we come back you'll formally rest, we'll read jury instructions, and do closings.

MR. BOYACK: We have one thing.

THE COURT: All right.

MR. BOYACK: On the verdict form we just would like the past and future medical expenses and pain and suffering to be differentiated.

THE COURT: Yeah. Let me see.

MR. BOYACK: Just instead of the general.

THE COURT: That's fine. That's fine.

MR. BOYACK: Yeah. That's the only change.

THE COURT: That was just what we had laying around, so.

MR. BOYACK: Yeah.

THE COURT: So you want -- got it. Yeah. That looks great. I actually prefer that as well.

MR. BOYACK: Yeah. That was the only modification.

THE COURT: That's better if we have some sort of issue.

MR. BOYACK: Right.

THE COURT: All right. All right, folks.

[Recess at 12:31 p.m., recommencing at 1:31 p.m.]

THE COURT: We're on the record already?

THE CLERK: We're on the record now.

THE COURT: Okay. So we're just going to note the Defense objection to instruction number 26, which is an instruction relating to my prior ruling on the motion for summary judgment. And as I understand it, the Defense is not objecting to the accuracy of the instruction, but just the decision that led to the instruction.

MR. RANDS: That is correct, Your Honor, and I just wanted to preserve that for the record.

THE COURT: All right. Anything you want to say about that, Mr. Cloward or Mr. Boyack?

MR. CLOWARD: Just to note that there's been no offer of proof as to what Dr. Sanders would have testified to. He didn't have the opportunity to review those records. He formulated no opinions regarding that, so to the extent that the instruction or the prior ruling is not appropriate, there's been zero evidence submitted to the factfinders that the wrists were not injured, rather the record has indicated that they were. And therefore, you know, we would move -- I mean, if the Court had not already ruled, we would be moving for a directed verdict on that issue right now, but since the Court's already ruled, then we don't need to move for a directed verdict on that issue.

THE COURT: All right. Anything else we need to take care of before we bring the jurors in?

MR. GARDNER: No, Your Honor. Thank you.

MR. CLOWARD: Is there anything you've shown the jurors

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; DAVID E. LUJAN,

Real Parties in Interest.

Case No. 81975

PETITIONER'S APPENDIX, VOLUME 26
(Nos. 3960–4126)

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Electronically Filed
3/28/2019 8:54 AM
Steven D. Grierson
CLERK OF THE COURT

RTRAN

DISTRICT COURT

CLARK COUNTY, NEVADA

AARON MORGAN, Plaintiff, vs. DAVID LUJAN, et al., Defendants.	CASE NO. C-15-718679-C DEPT. VII

BEFORE THE HONORABLE LINDA MARIE BELL, DISTRICT COURT JUDGE

TUESDAY, MARCH 5, 2019

RECORDER'S TRANSCRIPT OF
DEFENDANT HARVEST MANAGEMENT SUB LLC'S MOTION
FOR ENTRY OF JUDGMENT

APPEARANCES:

For the Plaintiff:	BENJAMIN P. CLOWARD, ESQ. BRYAN A. BOYACK, ESQ. MICAH S. ECHOLS, ESQ. KATHLEEN A. WILDE, ESQ.
For the Defendant Harvest:	DENNIS L. KENNEDY, ESQ. SARAH E. HARMON, ESQ. MICHELLE STONE, ESQ.

RECORDED BY: RENEE VINCENT, COURT RECORDER

Case Number: A-15-718679-C

Tuesday, March 5, 2019 - 9:53 a.m.

THE COURT: Morgan versus Lujan.

MR. KENNEDY: Thank Your Honor.

THE COURT: Could I get everybody's appearance for the record, please.

MR. CLOWARD: Your Honor, Benjamin Cloward on behalf of Aaron Morgan.

MR. ECHOLS: Micah Echols here for Plaintiff Aaron Morgan.

MR. BOYACK: Bryan Boyack for Plaintiff Aaron Morgan.

MS. WILDE: Kathleen Wilde for Mr. Morgan.

MR. KENNEDY: Dennis Kennedy and Sarah Harmon on behalf of Defendant Harvest Management, sub LLC. Also present is Michelle Stone, who is general counsel.

THE COURT: All right. Good morning. So before we get into this motion, I have a question for all of you. Would it be easier if I -- I know Judge Gonzalez sent it back for this purpose, but I can -- I mean, I can take the case back for all purposes if that's easier for everyone.

MR. CLOWARD: We would actually ask that.

MR. KENNEDY: Your Honor, we filed an objection to the case coming back for any reason.

THE COURT: Right.

MR. KENNEDY: So we can't consent to that.

THE COURT: Okay. All right. All right.

MR. CLOWARD: And, Your Honor, I mean, on that issue, you know, the case law supports that you would be the best person given that you presided over

two jury trials, almost a third jury trial.

THE COURT: There is a long history with this case.

MR. CLOWARD: True.

THE COURT: Well, let's -- we'll just start with the motion, and I'll give that some thought. So -- I'm sorry. So, Mr. Kennedy, your motion.

MR. KENNEDY: Thank you, Your Honor.

THE COURT: Let me start by asking you, so the case is currently in front of the Nevada Supreme Court. I know that you filed a motion with them. Do you think it would be more appropriate to wait until they determine the case is not properly in front of them?

MR. KENNEDY: I don't think we have to do that. We talked about doing that, but this is an issue that we can decide now because the motion to dismiss in front of the Nevada Supreme Court is on the ground that there's no final judgment, and the motion that's in front of the Court today is a step on the road to getting a final judgment.

THE COURT: Right.

MR. KENNEDY: So I think we would just -- we'd just be, in essence, wasting time. I think the Court's going to dismiss and say there's no final judgment, so we would just be back again on the same issue.

THE COURT: I have another question for you. Do you know if the settling of jury instructions was transcribed? Because if it was, I could not find it and I could not --

MS. WILDE: With the doors closing, I couldn't hear.

THE COURT: I was looking for the transcript of the settling of jury instructions, and I could not find that. I don't know if they were ever -- I just couldn't

find it. I couldn't find it in what was filed. I believe it was done on the day April -- I want to say that was April 6.

MS. HARMON: I don't know if I have a full transcript for that day, but let me look for the appendix.

THE COURT: So what was filed that's not in your appendix was -- the original transcripts filed didn't appear to include that, and then I couldn't -- I did not find it in your paperwork.

MR. KENNEDY: Yeah. I don't think we included it in --

MS. HARMON: No.

MR. KENNEDY: -- the standings here.

THE COURT: No.

MR. KENNEDY: We just included copies of the instructions themselves.

THE COURT: Right. Okay.

MS. HARMON: And we only attached excerpts in our appendix, so I don't believe we'd have the settling of the jury instructions.

THE COURT: I didn't see that. I just saw the instructions themselves. I just wanted to make sure that I didn't find --

MR. KENNEDY: Yeah, that's all we attached as an exhibit were the instructions.

THE COURT: All right.

MR. KENNEDY: The matter before the Court today is really a pretty narrow one, and that's Harvest's -- we call them Harvest Management or Harvest --

THE COURT: Right.

MR. KENNEDY: -- our motion for the entry of judgment in favor of Harvest and dismissing the claim or claims that were made by the Plaintiff against Harvest.

What happened was, that following the jury's verdict, a period of time elapsed, and the Plaintiff then filed a motion with Judge Gonzalez --

THE COURT: Right.

MR. KENNEDY: -- asking that judgment be entered in favor of the Plaintiff as to the individual Defendant and as to Harvest Management. We opposed that on --

MS. HARMON: And she denied their motion.

MR. KENNEDY: And she denied that motion. And then you see from the transcript, from that hearing that we attached, I said, well, will that judgment also include a judgment in favor of Harvest dismissing the claims? And she said, no, you have to file another motion, to which I said, sure, okay, we will do that. We filed that motion, and somewhat to our surprise, the opposition to our motion -- because we said, look, if you're not going to enter judgment in favor of the Plaintiff against Harvest, then, of course, you ought to enter a judgment in favor of Harvest dismissing the Plaintiff's claims. Makes sense.

The response we got from the Plaintiff was, oh, no, this is all Judge Bell's fault because Judge Bell was responsible for the verdict form not making any sense. That came as somewhat of a surprise to us because when you go back through the transcript and you look at the parts of the transcripts and the documents -- and we set this out in excruciating detail in our motion and our reply -- what happened, and then there's no question about it. When -- on the last day the Court said, hey, I have a verdict form that I used in another case, and it might be helpful to you --

THE COURT: My recollection is just one of the reasons that I get the transcript of the settling of jury instructions that either no one provided a verdict

form or what was provided was just not agreeable to everyone in some way, and I can't recall which of the two that was. I mean, typically, my JEA does the final of the jury instructions and verdict form, so if there are any issues, we certainly can make those corrections. I have never used a verdict form without having all of the lawyers review it.

MR. KENNEDY: Well, of course, and that's what you did in this case. And in the motion at page 12, starting at line 21, we quote the transcript where you say, "Will you guys take a look at this verdict form. I know it doesn't have the right caption. I know it's just the one we used in the last trial. See if it looks sort of okay."

THE COURT: Right.

MR. KENNEDY: And then Mr. Rands says, "Yes, looks fine." And then later on that day, Mr. Boyack says, "Yeah, that's the only change." He suggested a change, and he said, "Yeah, that's the only change." The Court says, "That's just what we had laying around, so." Mr. Boyack says yeah. And then he says again, "Well, that was the only modification," and that was to separate out past and future medicals. So that is the genesis of the verdict form. And then -- of course, now we're hearing the argument, well, this was Judge Bell's fault. They say it twice in their opposition. If Judge Bell hadn't made this mistake -- well, okay.

You have lawyers who look at the verdict form, approve it and actually the complaining party now made a change in it, but now they're saying they were shocked and surprised that the verdict form only named the individual Defendant. But if you look, and we set all of this out in detail in the memorandum, at page 14, when the argument -- the final argument, the closing argument is made to the jury, and this is page 14 of our motion, Mr. Boyack says, "Here's the verdict form." And

as good lawyers do, he said to the jury, "When you fill this out, here's what you should do. First thing that you will find out is, was the Defendant" -- singular -- negligent. The clear answer is yes, Mr. Lujan in his testimony that was read from the stand said that Mr. Morgan had the right-of-way." And then he says at the conclusion of that paragraph, "And then from there, you will fill out this other section, what percentage of fault do you assign each party? Defendant, 100 percent. Plaintiff, zero percent." And that's exactly what the jury did.

And now they're saying, well, that judgment should also apply against the other Defendant. Well, the other Defendant is nowhere on the jury form. And Judge Gonzalez said, I can't -- and there are no jury instructions that pertain to Harvest, the other Defendant, and there is nothing on the form. In fact, the jury form itself says the individual was 100 percent at fault.

Now, the narrow question presented to this Court is after Judge Gonzalez said, look, there's not going to be a judgment entered against Harvest based on everything that occurred. We ask that the Court say in that event, the claims against Harvest should be dismissed, and there should be a judgment entered in Harvest's favor.

The only argument that is new here that wasn't made to Judge Gonzalez when she denied their motion is, now it is somehow Judge Bell's fault that the verdict form got messed up, and the provisions from the transcript that I just read to you show that that just isn’t the case. The Court said, Here's a form I've used. I know the parties aren't the same. You got to change that. Do you approve this? Yes, with one change, it's all approved. And that being the case, there is no reason that this Court should not enter a judgment in Harvest's favor dismissing the Plaintiff's claims against it. And if the Court has no questions --

THE COURT: I don't. Thank you.

MR. CLOWARD: Good morning, Your Honor.

THE COURT: Good morning, Mr. Cloward.

MR. CLOWARD: So the tone and tenor has never been to blame the Court.

THE COURT: I understand, Mr. Cloward. I mean, I will say I do think-- I was just trying to pull up the jury instructions. I mean, typically, it is the custom of the Court when we do a caption on a verdict form that it matches identically the caption on the jury instructions.

MR. CLOWARD: Correct, and --

THE COURT: So I do think there was an error in that regard.

MR. CLOWARD: Certainly. And the jury instructions contain the correct caption, so if you look at this matter and if you simply put the first page of the verdict form with the correct caption, then the judgment is against both Defendants. But they want to come in here and take advantage of a clerical, ministerial error.

At no point was there ever any attempt to modify the caption, to modify the parties in the case, to suggest that the corporate Defendant should not be included. This was simply Your Honor trying to do everybody -- take one thing off of everybody's plates and say, hey -- and it's on page 107 of the transcript of Friday, April 6th, where the Court says, "Hey, I haven't seen the verdict form. I've had like six car crashes this year. I've got one for your guys." And everybody was grateful for that. Everybody was grateful that the Court took that issue off of our plates along with the other issues that we have. Now they come in here and try and pass on this to try and create this issue.

And throughout the brief, I counted on ten different times they claim that

he was on break, he was on break, he was on lunch break, on lunch break, ten different times. Well, that's not what the testimony was. The testimony was specifically that he, quote, had just ended his lunch break. So he ended his lunch break and now he's back on the clock.

And they try and say, well, you know, there's never this issue of -- you know, there's never this issue of the corporation, and there's no instructions for respondeat superior. The reasons the jurors weren't instructed on that is because that was never a contested issue. This was not a contested issue until appellate counsel gets involved in the case. Never at any point was there ever any argument in the claims notes, in the discovery, during the first trial, during the second trial that he was on some sort of a frolic and detour or on some sort of a lunch break during the time of the collision. The testimony was crystal clear in the first case and the second case, he had finished his lunch; he was back on the clock.

Counsel cites to the *Rockwell v. Sun Harbor Budget Suites* case, which is 112 Nev. 1217, and it says, "To prevail on vicarious liability, it must be shown that, one, the actor at issue was an employee; and, two, that the actions complained off occurred when the course -- within the course and scope of the actor's employment."

The testimony was crystal clear. We have a bus driver driving a bus at the time of the crash who was employed with the Defendants. In order for them to prevail that this is -- that this is some sort of a frolic and detour, that it was outside the scope, they specifically cited to that case.

They say that they -- they have to show or that we -- they're citing to the *Rockwell* case, which is quoting *Prell Hotel,* which says, "That it must be shown

that it is independent venture of his own and that it was not committed within the course of the very task assigned to him." Well, I guess what? He is a bus driver driving a bus for this company at the time. This -- I mean, we were shocked. We tried to just stipulate saying to counsel, hey, look, this is a ministerial error. It's clear -- you know, it's clear that this is what happened. They won't agree, so that's why we filed the motion.

And all of a sudden, we get this big, giant opposition saying, oh, no, no, no. you know, this was -- he's outside the course and scope. And we're like, are you -- huh? Kind of shocked, like are you really making this argument? You're really going to make this argument.

And, you know, the fact of matter is, is pursuant to *Evans v. Southwest Gas* -- and this is a direct quote -- "Where undisputed evidence exists concern the employee's status at the time of the tortious act, the issue may be resolved as a matter of law." That is citing to *Molino v. Asher* -- that's 96 Nev. 814 -- and *Connell v. Carl's Air-Conditioning* at 97 Nev. 436. This has never been an issue that he was outside the course and scope of his employment.

And they cite to the *Rockwell* case. We met the burden that he was in the course and scope, the very act that he's driving the bus. I mean, I don't know what else to say, I mean, Your Honor, the fact that we give the jury instruction on the corporations.

And the Court was correct, I didn't see any settling of the instructions that I read, but I did read the settling of the instructions in the first case. And, specifically, the Defense points out, the Court says, "You know, the corporations" -- and it was referring to Instruction 17 at the time; they were renumbered. But the Court says, "I don't know how this snuck in here," and all of the parties -- I jump up,

Mr. Boyack jumps up, Mr. Rands jumps up. Everybody says, no, there's two Defendants. There's a -- and then the Court says, oh, yeah, I'm mistaken, I'm sorry about that. We're going to give that instruction.

That instruction is carried over to the next case. It's given as Instruction Number 5. Well, if this guy is not on the job, if this guy is not in the course and scope of his employ, why isn't there a directed -- a motion for directed verdict after the close of our evidence? You know. Why is it that they lie and wait for this ministerial action?

And, again, all the Court has to do is take the first page of the caption from the jury instructions and supplant that for the -- for the verdict form because there's no text on the verdict form. It's just a caption. Swap those two, and guess what, the judgment is against both Defendants, but they're trying to take advantage of this.

And, additionally, Your Honor, the singular versus plural argument saying, hey, look, you know, it's only against one Defendant, well, there are also instructions that talk about both Defendants, specifically the insurance instruction. The insurance instruction says you can't consider whether either Defendants, plural, have insurance. Again, this is just a tactical maneuver to try and avoid responsibility in this case. It was never a bona fide issue that was ever, ever raised by anyone during the course of this, and that’s why there was not a specific instruction on respondeat superior because it was not an issue. Everyone agreed.

Even Ms. Jansen, when she took the stand, the 30(b)(6) for Harvest, and she gives her testimony, never once did she say, well, you know what, the guy wasn't on the job. We asked her, you know, who's at fault for this, and why are they at fault? Well, your driver was at fault because he should've seen the bus.

That was the singular thing that she said, is that your driver, Mr. Morgan, was at fault for causing this crash because he wasn't -- he didn't avoid the crash. Yet now they want to come in and reinvent the wheel and say, well, you didn't present this and you didn't present -- we didn't have to present that because it wasn't disputed.

Thank you, Your Honor. Do you have any specific questions?

THE COURT: No, I don't. Thank you.

MR. CLOWARD: Thanks.

THE COURT: Mr. Kennedy?

MR. KENNEDY: I just have a couple points, Your Honor.

THE COURT: Sure.

MR. KENNEDY: First, the argument is made, well, if you just change the caption on the verdict form, the problem's solved. That doesn't do it.

THE COURT: Right.

MR. KENNEDY: Okay? The verdict form itself pertains to one Defendant, and it pertains to a Defendant who is negligent, and those are the jury instructions. There are no -- there's nothing on the jury -- on the verdict form that pertains to another Defendant. And if they did intend to put two Defendants on the verdict form, you have to apportion fault between those two Defendants, and that's not on here, so -- I mean, changing the caption doesn't do it The argument that --

THE COURT: Well, I mean, it's true, vicarious liability typically don't find fault between defendants, right? I mean, I understand what you're saying and I understand that there's an issue with the verdict, but the way this case was presented by both sides, there was really never any dispute that this was an employee in the course and scope of employment. It was never an issue in the case.

MR. KENNEDY: Actually, there was no evidence substantively presented by the Plaintiff. What the employee -- what the evidence on the employee was was he was returning from his lunch break. He had just eaten lunch and was returning. And, of course, Nevada has the coming and going rule. Okay. He had no passengers in the bus. He'd gone to eat lunch on his lunch break. That's why we will -- so he's not in course and scope of his employment at that point. That is why --

THE COURT: I mean, that wasn't an affirmative defense raised in the answer that -- I mean, I don't recall that issue.

MR. KENNEDY: And there is no claim in the complaint for vicarious liability. It's negligent entrustment.

THE COURT: It's like vicarious liability and negligent entrustment is the third one?

MR. BOYACK: Yeah, that's --

MR. KENNEDY: But this is -- this is all -- every one of these arguments, Your Honor, was made to Judge Gonzalez, and she says, if you want to make these claims, you have to have some jury instructions. You have to have a verdict form that has a jury's finding of liability in it. We don't have any of that.

THE COURT: I understand, Mr. Kennedy. I'm just telling you my recollection, having dealt with this case -- and this was -- I mean, for whatever reason, one of those cases that is extraordinarily full of holes. We had, you know, a mistrial. We had a failed start of the trial. We had a number of motions.

There were a number of issues with this case that made it complicated and one that sticks out in my memory a bit more than others, and I do -- I mean, I just don't recall that there was ever any -- anything raised as a concern. It wasn't

an issue.

MR. KENNEDY: Because the Plaintiff didn't present enough evidence on it to really merit any defense other than the driver saying, I was on my lunch break and returning, and that's the coming and going rule. He wasn't driving passengers. He had nobody in the bus. He said, I had gone to this park, was eating lunch and I was returning.

And then what we do is we get to the closing argument. There is no part of the closing argument whatsoever on any liability for Harvest. Nobody says anything in the closing argument. In fact, in the closing argument, it is obvious that the focus is on the individual Defendant because the Plaintiff's lawyer stands up with the verdict form and says, "The Defendant is 100 percent negligent." That's Mr. Lujan. And that's what they say to the jury, and the jury comes back and finds that.

Now they're saying, well, you know, we think there was another defendant who should've been filed liable to some degree, and we think that the jury would've done that had we proved it, had we argued it, had we had a verdict form that was proper. All of those arguments were rejected by Judge Gonzalez. She said, "I am denying the motion for entry of judgment against Harvest." There's no evidence, there's no argument, there's no jury instructions on any kind of derivative liability at all. It's just not there.

And to say, well, it wasn't contested, so the jury must have found that, even though they didn't find it, is absurd, and I don't -- I don't think the Court really at this point can go behind the evidence and the verdict form and say that the jury probably would have found something other than it did if things had been done properly.

Because the focus and the closing argument -- in fact, the focus of the whole case was on the individual, and the verdict form was examined and prepared, and it focused only on the individual. There is no mention in that verdict form of the other Defendant, and there are no jury instructions on liability for the other Defendant. To say we have a stock instruction that says treat corporations like individuals, that doesn't get you anywhere at all.

And so based on what Judge Gonzalez did and the narrow issue that's presented to Your Honor, I think it's clear that Your Honor should enter a judgment in favor of the Harvest Defendant, dismissing the Plaintiff's claim or claims against it. And I'm done if the Court has no questions.

THE COURT: No, I don't. Mr. Cloward, anything else?

MR. CLOWARD: Yes. Your Honor, Rule 54(b) indicates that this Court does not have to consider anything that Judge Gonzalez did, and I think Judge Gonzalez recognized after this second motion was filed, but you know what, it's probably appropriate to send this back to Judge Bell who presided over two jury trials and a failed third start and let her address these issues.

So we're asking that the Court either deny Harvest's motion and enter judgment against our client. If the Court wants us to file a different motion, a separate motion for reconsideration so the Court can apply 42, NRCP 42, we're happy to do that. But at the end of the day, the Court is correct in the recollection; this was never a contested issue until appellate counsel got involved. It is -- it is plain and simple.

Further, the *Price v. Sennott* case, 85 Nev. 600, "A party cannot gamble on the jury verdict and then later, when displeased with the verdict, challenge the sufficiency of the evidence to support it." Mr. Kennedy is saying, well, Plaintiff

didn't do this and Plaintiff didn't do that and Plaintiff didn't do all these things. Well, the reason we didn't do these things is because this was never a bona fide issue. It never was. Yet they're trying to seize on this ministerial clerical error, which was done as a courtesy to the parties, and it's really unfair. Thank you, Your Honor.

THE COURT: All right. So I want to look at -- I want to look at the transcripts related to the settling of the jury instructions. I found the old one, and I just need to find -- I can't remember if we just used the same ones or if there was additional discussion of the settling of the instructions after, but I wasn't able to find that.

MR. KENNEDY: Your Honor, we have the full transcript, so we'll look for it, too, and file them.

THE COURT: Yeah. I just -- the transcripts are filed. I just -- I couldn't -- I went through them and I couldn't find that part, you know, that -- Mr. Cloward jogged my memory, that we had both of the settling of instructions in the first trial. He at least remembered, but I didn't see that either. I just want to go through those before I make any decision here because I want to see what the discussions were relative to what the instructions were or were not included.

And so I'm going to set a status check. I'll set it two weeks just to give me an opportunity to go through them. Don't -- you don't need to come back to court. I'm just doing that for my own benefit. And then I will issue a written decision once I've had the opportunity to review them. If I have additional questions after that, then I will let you know.

MR. KENNEDY: Okay.

THE COURT: All right. Thank you.

MR. KENNEDY: Sounds good.

MR. CLOWARD: Thank you, Your Honor.

[Proceeding concluded at 10:29 a.m.]

ATTEST: I do hereby certify that I have truly and correctly transcribed the audio-visual recording of the proceeding in the above entitled case to the best of my ability.

Renee Vincent

_____

Renee Vincent, Court Recorder/Transcriber

IN THE SUPREME COURT OF THE STATE OF NEVADA

AARON M. MORGAN, INDIVIDUALLY,
Appellant,
vs.
DAVID E. LUJAN, INDIVIDUALLY; AND HARVEST MANAGEMENT SUB LLC, A FOREIGN LIMITED-LIABILITY COMPANY,
Respondents.

No. 77753

FILED

MAR 07 2019

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER DENYING MOTION TO DISMISS

Respondent Harvest Management Sub, LLC (Harvest), has filed a motion requesting this court to dismiss this appeal for lack of jurisdiction. Appellant opposes the motion, and Harvest has filed a reply. We deny the motion. This denial is without prejudice to respondent Harvest's right to renew the motion, if necessary, upon completion of settlement proceedings.

It is so ORDERED.[1]

_____, C.J.

cc: Ara H. Shirinian, Settlement Judge
Richard Harris Law Firm
Marquis Aurbach Coffing
Bailey Kennedy
Rands, South & Gardner/Henderson

[1]Appellant's conditional counter-motion to postpone or extend time for consideration of motion to dismiss, which Harvest opposes, is denied as moot.

DISTRICT COURT
CLARK COUNTY, NEVADA

Negligence - Auto	**COURT MINUTES**	**March 14, 2019**

A-15-718679-C Aaron Morgan, Plaintiff(s)
vs.
David Lujan, Defendant(s)

March 14, 2019 **02:00 PM** **Minute Order**

HEARD BY: Bell, Linda Marie **COURTROOM:**

COURT CLERK: Estala, Kimberly

RECORDER:

REPORTER:

PARTIES PRESENT:

JOURNAL ENTRIES

For convenience, case A-15-718679-C shall be transferred to Department 7 effective immediately pursuant to EDCR 1.30(b)(15).

CLERK'S NOTE: A copy of this Mintue Order was electronically served to all registered for Odyssey File and Serve. //ke 03/14/19

Electronically Filed
2/12/2020 11:20 AM
Steven D. Grierson
CLERK OF THE COURT

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DISTRICT COURT

CLARK COUNTY, NEVADA

AARON MORGAN, Plaintiff, vs. DAVID LUJAN, et al., Defendants.	CASE NO. A-15-718679-C DEPT. VII

BEFORE THE HONORABLE LINDA MARIE BELL,
CHIEF JUDGE OF THE DISTRICT COURT
TUESDAY, MARCH 19, 2019

RECORDER'S TRANSCRIPT OF STATUS CHECK: DECISION AND ALL DEFENDANT HARVEST MANAGEMENT MOTIONS

APPEARANCES:

For the Plaintiff:	KATHLEEN A. WILDE, ESQ. BENJAMIN P. CLOWARD, ESQ. MICAH S. ECHOLS, ESQ.
For Defendant Harvest Management:	DENNIS L. KENNEDY, ESQ. SARAH E. HARMON, ESQ.

RECORDED BY: RENEE VINCENT, COURT RECORDER

Case Number: A-15-718679-C

Tuesday, March 19, 2019 - Las Vegas, Nevada

[Proceedings begin at 9:10 a.m.]

MR. CLOWARD: Hi, Judge. Good morning. Ben Cloward for Plaintiffs -- or for Plaintiff.

THE COURT: So with respect to the -- I'm sorry, can I get everybody's appearance.

MS. WILDE: Good morning, Your Honor. Kathleen Wilde, Bar Number 12522, for Mr. Morgan.

MR. ECHOLS: Good morning, Your Honor. Micah Echols for Plaintiff.

MR. CLOWARD: Ben Cloward for Plaintiff.

MR. KENNEDY: And Dennis Kennedy and Sarah Harmon for Defendant Harvest.

THE COURT: All right. So with respect to the motions that I heard recently, I'm still just concerned a little bit about the language. I don't believe I have jurisdiction at this point, but I am going to certify under *Honeycutt,* that if the case is returned to me, I would recall the jury to see if we can correct the error with respect to the verdict form. So I'm going to send that to the Supreme Court and we'll see what they do. We have today the motion for fees, so --

MR. KENNEDY: Your Honor, if --

THE COURT: Oh. And I'm also reassigning the case to myself. I think that given the long history I had with the case -- frankly, I didn't really anticipate any significant issue in the case or I would have kept it in the first place. I spoke with Judge Gonzalez, and we both felt it was [indiscernible] for it to stay here.

MR. KENNEDY: Just a couple points of clarification --

THE COURT: Sure.

MR. KENNEDY: -- the first one being, you said that you don't know that you have jurisdiction and you're going to --

THE COURT: I don't believe I have jurisdiction, so I'm going to -- I'm issuing an order saying that I don't have jurisdiction to make -- to consider the motion that was in front of me but to do the Honeycutt certification regarding what I would do if the case was returned to me.

MR. KENNEDY: Okay. And that, just so the record is clear, is Harvest's motion for the entry of judgment?

THE COURT: Yes.

MR. KENNEDY: Okay. The second -- that being so, I guess my question is, would it make more sense not to proceed with the costs motion, et cetera, et cetera, until that matter is resolved? Because it's kind of -- the costs are in a number of ways dependent on what happens in that motion. Just from Harvest's point of view, I think --

THE COURT: Right.

MR. KENNEDY : -- it would make more sense. I don't know what the -- what the plan of things, but we could get a decision, but then that decision is just going to be hanging there --

THE COURT: Right.

MR. KENNEDY: -- until the Supreme Court makes a decision.

THE COURT: I mean, I can certainly make a decision with respect to costs, with respect to Mr. Lujan as a defendant.

MR. KENNEDY: Yeah, that --

THE COURT: The Harvest issue, I think, is just unresolved right now, so --

MR. KENNEDY: Okay. And just before we start, if I could get clarification. I saw the minute order on the case being transferred back to Your Honor. Could -- just so that the record is clear, could Your Honor give some explanation of how that -- how that occurred and the reasons for it? I know the Court cited the rule --

THE COURT: Right. I mean --

MR. KENNEDY: -- but the rule asks for a little bit more.

THE COURT: Well --

MR. KENNEDY: Necessity and convenience. I'm just curious.

THE COURT: Right. As I just explained, because I have familiarity with the case, I had this case for --

MR. CLOWARD: Long time.

THE COURT: -- you know, two years. We did three trials, two of which didn't go -- go to plan. I completed the third trial. By the time that it was reassigned to Judge Gonzalez, there really was -- I would not have anticipated there to be any -- anything but simple post-trial matters.

And given the complexity of this particular issue, my familiarity with the case, I would have had this case in the first place if I had -- if I had known that there was going to be this kind of issue. I don't typically --you know, in every case reassignment I've ever been through in my ten years in the court, I have kept any case where there was a complicated issue where I have had the case for -- for trial.

MR. KENNEDY: Okay. Thanks. I appreciate the explanation. Just that I wanted to make sure we have a clear record in case --

THE COURT: All right.

MR. KENNEDY: -- that issue comes up.

THE COURT: Well, I thought I had just done that, Mr. Kennedy.

MR. KENNEDY: Okay.

THE COURT: Okay. So, folks, what do you want to do on the case? Do you want to wait?

MS. WILDE: We believe we should go ahead with that issue, Your Honor, because it's collateral. There's no reason that we can't discuss especially the attorney fees and costs that were incurred because of the mistrial. This is just a continuation of the motion from way back in March 2018.

To the extent that there's any different fees, for example, a 68(f) or things like that, we would address that after the judgment issue is addressed. But the pending motion, we believe is collateral and could be addressed today regardless of the *Honeycutt* issue.

THE COURT: Okay.

MS. WILDE: All right. So as I stated, Your Honor, this is a renewal or just kind of reinvigorating the motion that had occurred in March 2018. It is my understanding -- I wasn't there, but it was my understanding from Mr. Cloward that what had happened was that the motion had been filed following the mistrial in November 2017, and then there were various continuances. And eventually it was taken off calendar really for the convenience of everybody and the practicality at that time because there was going to be -- and there ultimately was -- a jury trial then in April 2018.

So the fees and costs that were sought with this motion are specifically related to -- at least in the first part -- the fees and costs that were incurred because of the mistrial. And the mistrial was a result of -- whether we call it complete, deliberate misconduct or whether we call it, at best, complete negligence and ineptitude, it was a result of Defense counsel's misconduct. So our

position is that Mr. Morgan should not bear the expense of a mistrial that was wholly not his fault.

Now, we understand that Defendants have said, well, you know, there was no motion in limine in place, but we don't need a motion in limine in place saying follow the Rules of Evidence. That should be obvious to anyone who practices law. So we submitted that attorney fee specific to the mistrial in the amount of $47,250, are available under a number of sources. They're available under NRS 7.085. They're available under 18.010. As (indiscernible) mentioned, they're available 18.070.

And, of course, the Court also has inherent authority to do what is equitable and to make the parties in fair positions and essentially grant a sanction because Mr. Morgan should not bear the costs of this wrongdoing. For that part of our motion, we believe that both Defendants and also that counsel for the Defendants have the ability to split that in the Court's discretion because it's really attributable to them, and it was done for their own benefit.

We also added in, because of the judgment for Lujan, costs just as a prevailing party, and that's a much cleaner, much simpler issue, especially because Mr. Lujan did not file a timely motion to retax. So for that portion, we also maintain that we're entitled to costs as a prevailing party in the amount of $97,225.13. The documentation was provided both in March, around the same time that they had briefed this mistrial issue, and then more recently was resubmitted in December after the judgment was entered as to Mr. Lujan. And so that's a different issue, but that still is clean, basic collateral issue that could be addressed at this time.

THE COURT: All right. Thank you.

MS. WILDE: Thank you.

THE COURT: Mr. Kennedy.

MR. KENNEDY: Again, Dennis Kennedy for Defendant Harvest Management. Again, I would suggest to the Court that ruling on the costs and fees issue with respect to Harvest should be deferred until after the Supreme Court does whatever it's going to do, but because we're arguing those, let's go to the motion itself. Yeah, usually I talk loud enough, but --

The motion itself, 97,225.13 is not sought against Harvest in the motion. So as we said in the motion, we won't even address that because the motion says on page three, the costs are sought against the other Defendant and counsel, so we don't address that in the motion. And the motion's not ambiguous. It's very clear. It says costs are being sought against these two.

The attorney's fees are sought against all three parties, Harvest, Lujan and counsel. And so what we did was we looked at the motion and we said there is a specific statute, 18.070, that governs costs and fees in the event of a mistrial. That statute is completely missing from the motion. That is a specific and particular statute that governs costs and fees in the event of a mistrial, and as we point out in our opposition, the rule is, it's against a party or an attorney who purposely causes the mistrial.

We go back to the motion and we look to see if the motion addresses that point. It does not. The motion relies on two other statutes, NRS 7.085. That applies to lawyers only. That's a frivolous claim's statute and only applies to lawyers. 18.010(2)(b) applies to prevailing parties, and it applies to prevailing parties if there is a claim brought in bad faith without substantial justification, et cetera, et cetera.

We don't have that here because, number one, there is no -- the Plaintiff is not a prevailing party against Harvest when a mistrial is granted. There's no prevailing party in that situation, which leads us back to the reason that 18.070 exists, which says in the event of a mistrial, here's what governs.

Let's assume, though, that somehow the Court is going to consider the motion and is going to assume that the standard under 18.070 is applied even though it's not cited in the motion. Well, what we look at is, it says, costs and fees against the attorney or the party who purposely caused the mistrial.

Now I won't speak for the Gardner and the Gardner law firm. I will only speak for Harvest. The Gardner law firm did file an opposition. Harvest cannot possibly be held to have purposely caused a mistrial. This was a question on cross-examination asked by a lawyer of a witness in what is charitably called a difficult area of cross-examination and -- and at least I think so.

And there was some argument about it with the Court. The Court declared a mistrial. If that's the case, then the Court has to say, did Mr. Gardner purposely cause the mistrial? That's the question. It seems pretty clear from the transcript he didn't. He had a pretty good faith basis that he articulated for asking that question. Secondly, 18.010, which I mentioned earlier --

THE COURT: So, Mr. Kennedy, let me ask you a question about that. Because where does the point come when a lawyer's complete disregard for a rule is -- I mean, I suppose anybody could say, right, I didn't do it on purpose, but we're also expected to know the rules. Do you have any thoughts on that issue? Do you understand what I'm asking?

MR. KENNEDY: Yeah. Correct. The mistrial situation, the statute specifically says, purposefully did it. Okay? I'm speaking for Harvest, and I say,

no, Harvest didn't purposefully do it.

THE COURT: I understand.

MR. KENNEDY: Yeah. I mean, it had nothing to do with it.

THE COURT: That's not what I asked you.

MR. KENNEDY: Okay. As to Mr. Gardner --

THE COURT: There has to be some --

MR. KENNEDY: Yeah. In a typical mistrial, there's a motion in limine or order in limine saying you will not ask the following question or will not touch the following topic. The lawyer gets right up and does it. Well, that's purposefully. Okay? This, though, is an evidentiary question involving how can a character witness be impeached?

My own personal view is, I think Mr. Gardner was correct in the impeachment that he did. The Court ruled otherwise. He felt very strongly that he was correct, and I think that he was, but it's a gray area where the Court has to exercise some judgment. The Court did and declared the mistrial.

The question is, did Mr. Gardner do it intentionally? It certainly does not seem as though he did because I read the transcript where there's an argument over this, and he certainly had a good faith belief in what he was doing. He was not impeaching a party with an arrest that doesn't go to a conviction. He was -- he was impeaching a character witness with other conduct of the person whose character was at issue. And I think he had a pretty argument that he was right. The Court said he was not, and we moved on from there.

It certainly does not appear that he did that intentionally in order to cause a mistrial. Now, that just doesn't appear anywhere, and I don't -- I think it's a great leap for the Court to reach that conclusion. But, again, I don’t speak for

Gardner. I speak for Harvest. Harvest certainly didn't do anything to cause the mistrial, and parties can do things.

THE COURT: I don't think you answered my question. I mean, my question is, is there a point where an attorney's blatant disregard of the rules becomes purposeful conduct?

MR. KENNEDY: Oh, yeah, absolutely. Sure, it can --

THE COURT: Okay. And it's just by the motion in limine, right, that we expect lawyers to know the rules and comply with them?

MR. KENNEDY: That's right.

THE COURT: Okay.

MR. KENNEDY: And as I said -- yeah, we do expect that, and in this case, I think, there was room for debate over whether they're --

THE COURT: And I appreciate that. That's your opinion.

MR. KENNEDY: Yeah. But there does come a point where a lawyer clearly violates a rule and the court says, look, I know you did that intentionally.

THE COURT: Well -- okay. That wasn't my question. I mean, is there a point where, you know, right, ignorance of the law is not a defense; yeah? So if the lawyer doesn't -- if the lawyer doesn't know the rule, they violate the rule because they don't know the rule -- I mean, they can say, well, I didn't know the rule, right? So then under that circumstance, it would never be purposeful. I guess it would be good if the lawyers -- none of the lawyers knew the rules and me either.

MR. KENNEDY: Well, yeah, but, of course, that's not going to get you very far. The question is, a lawyer can violate the rule and the court can say, man, you do not know the rule --

THE COURT: Right.

MR. KENNEDY: -- on this. The next question, though, is, did the lawyer purposely and intend to cause the mistrial? Now, as I said, I'm not speaking for -- for Gardner.

THE COURT: No. I'm talking hypothetically.

MR. KENNEDY: Yeah.

THE COURT: I understand -- I understand your position here. I just -- what I'm saying is that at some point with them not knowing the rules, right, the lawyer purpose -- that purposeful conduct cannot be purposeful.

MR. KENNEDY: The Court could conclude that. The Court -- the Court could say ignorance is such a basic rule. Yeah. I don't think that's the case here, but the Court surely could say that. And so the sum and substance of this is, as to Harvest --

THE COURT: I'm sorry, could you do me a favor? Could you take that lamp and just turn it a little bit towards you?

MR. KENNEDY: Sure.

THE COURT: Keep going.

MR. KENNEDY: How's that?

THE COURT: There you go. Thank you.

MR. KENNEDY: Because it's a little dark up here.

THE COURT: Right. Yeah, this court is horrible. There's -- both sides are in my eyes. The light is in my eyes.

MR. KENNEDY: Okay. Sum and substance, I think it probably is a good idea, if the Court's going to do a *Honeycutt* submission, that the Court defer ruling on the costs and fees as to Harvest because depending on what the Supreme

Court does, it could have a big impact on it.

THE COURT: Okay.

MR. KENNEDY: But the motion itself ought to be denied. Now, we also have a motion to strike the reply because the reply comes back and says, oh, well, yeah, we -- we think the Court should award these under 18.070. Well, the motion wasn't based on 18.070. That was what we said the motion failed because of that.

And then the Plaintiff also says, well, you know, the Court also had the inherent authority to do this if it feels like it. Our response is, well, where there is a specific statute governing this, saying here is the rule and here is the burden of proof on that, that the Court's probably obligated to apply that statute and not say, well, the statute hasn't been met, but I'll exercise my inherent authority. I think it's pretty clear the Court should not -- should not do that. That's not the proper use of inherent authority.

So that's Harvest's position. We think -- Harvest thinks the Court ought to defer, but if the Court does not, then the Court has to deny the motion as to the fees and the costs for Harvest at this time. But the safer course is for the Court to defer.

THE COURT: Okay, Mr. Kennedy.

MS. WILDE: I think at the outset it's useful to clarify how the costs breakdown works here. The total 97 and change costs are as a prevailing party, and that would include the costs incurred as part of the mistrial. Specifically with respect to both the Defendants and their defense counsel, about 20,000 and some change were costs attributable to that mistrial. So that's a separate issue, and that could be divided out depending on how the Court rules.

With respect to striking the entire reply, that's obviously a very

extreme response when, at most, we have an agreement to disagree as to whether statutes work in tandem.

THE COURT: I hate to interrupt you. I have a question for Mr. Kennedy --

MS. WILDE: Of course, Your Honor.

THE COURT: -- that maybe I should've clarified before, and it just sort of came to me. So at this point you are just representing Harvest and not Mr. Lujan?

MR. KENNEDY: That is correct, Harvest only.

THE COURT: That is at some point on the record. And so Mr. Gardner is still counsel for Mr. Lujan?

MR. KENNEDY: Not me.

MS. HARMON: Mr. Rands, we believe is representing Mr. Lujan, but we don't know for sure, Your Honor.

MR. KENNEDY: We've made attempts to ascertain who's representing Mr. Lujan. They have not been altogether successful. But we are not. We have Harvest only.

THE COURT: Okay.

MR. KENNEDY: But as Ms. Harmon said, we've tried and not been successful in really determining who has taken over that representation.

THE COURT: All right. Thank you. Sorry.

MS. WILDE: No problem. And it is a good point because during the entirety of the trial, both Defendants were represented by Mr. Rands and Mr. Gardner, and the separation is actually a fairly new thing that happened after the fact when Mr. Kennedy's office came in. And, actually, there is even a little bit of confusion that at first, it kind of appeared like they were representing both Defendants, but now it's now been clarified that they're only representing Harvest.

And communication's been a bit dicey with Mr. Rands, I think is probably the best way to put it. But it appears that he is representing at least Mr. Lujan in this matter and at least through the appeal. So as for that issue, that clarification.

Now, with respect to which statutes apply, we believe it goes back to the *Watson Rounds* case that we cited in our reply and we've discussed at other occasions, that really all these statutes work in tandem. The language in 18.010 really specifies that in saying, in addition to other relief that's available. But the idea that the court conveys in *Watson Rounds* is that each of these statutes has a different role, but they can work in tandem. Sometimes one applies better than others. And, of course, inherent authority always comes in.

Now, courts are restricted with inherent authority and for good reason, but when there are situations where there has been an inequitable situation or where counsel are just completely out of line, of course the Court has the ability to sanction that conduct.

And in this case, while there's an argument that there's a gray area in evidence, we know what Mr. Rands and Mr. Gardner -- well, actually Mr. Gardner. Mr. Rands had stand down, stop it, we don't want this, but Mr. Gardner sent out that he wanted to prove that Mr. Morgan was not the next superhero, which was what was said in the opposition for both Defendants. So the intent was that they wanted to show he's a video game playing loser who stays home and has a drinking problem. That was the intent, at least according to what they said in their opposition.

THE COURT: But, you know, the whole purpose of cross-examination by opposing counsel is to paint the person on the other side in a less than favorable

light, right, and that's --

MS. WILDE: Absolutely. Absolutely. And that's always the difficult --

THE COURT: That's not a -- that's not a legitimate position.

MS. WILDE: Right. It's definitely the difficulty with cross-examination and really with evidence in general, said good evidence and good argument by definition is prejudicial. The question is whether it's unfairly so or it does so in the way that crosses the line into a rule that's not okay, which here arguing about an arrest for a misdemeanor offense of which Mr. Morgan had not been convicted and ultimately was not an appropriate use of a cross-examination, period, and that's why we had a mistrial.

It's my understanding, as in all cases, nobody wants a mistrial. That's always something that's unfortunate for everybody, but in this particular case, the mistrial was necessary. Even as Mr. Rands stated in the trial transcript on page 163, this was definitely a mess-up. This was definitely a big deal, and whether it was done with the intent of, I'm going to court today to cause a mistrial or the intent of, I'm going to discredit and maybe I don't know the Rules of Evidence or I'm going to try and push the Rules of Evidence, the fact remains that it happened.

And really who should bear that cost? It shouldn't be Mr. Morgan because he was innocent in all of this. Everybody was just trying to have a clean trial, and we wouldn't have had all this wasted time, all these wasted resources were it not for a veteran attorney who should've known better and who actually even had his co-counsel say, okay, we're moving on, what are we doing here? And I'm getting that, obviously, secondhand from Mr. Cloward, I wasn't there, but it's my understanding that this really was counsel making an egregious error, and it

really cost everybody a lot of time and resources, and we believe that Mr. Morgan shouldn't have to pay for that.

THE COURT: So let me ask you a question. 18.070 was not included in any of your motions that err to the Defense for me to consider that.

MS. WILDE: I believe it's fair for the Defense because they raised it specifically in their opposition. So by bringing that up, they were trying to argue, okay, it's only under this statute. So they're trying to argue essentially if there's an exclusive remedy, so it was on their radar. They made an argument in their opposition about the issue. So from them raising the position, I don't think it's unfair to assess that particular statute. Oh, that also works in tandem with all of the others.

THE COURT: All right. But a party can't raise an argument in their reply for the first time, right, and then -- defense counsel also has an ethical obligation to raise any authority that may be contrary to their position, so I feel almost like it penalizes them for appropriately raising some authority that wasn't necessarily helpful to their side.

MS. WILDE: I think that's a fair point, that they're obviously trying to cover all the different bases, but they also did file a sur reply. So any of the concerns of this being raised for the first time, I think, are also eliminated because they had the sur reply and the opportunity to address that point.

THE COURT: Okay.

MS. WILDE: It's really a question of were there -- was there any prejudice in how the way that this went down, and, ultimately, because they've had the chance to argue it in their opposition, in their sur reply and now verbally, I think their prejudice is minimal at best, especially because this is still a question of

statutory interpretation and impressions of really law, which one of these statutes is most applicable. I don't see that that's type of prejudice that would prohibit granting the motion, especially because it's one of many alternative bases.

THE COURT: Okay.

MS. WILDE: And also, I had just noted with regard to the *Honeycutt* issue, and, obviously, that's something that is helpful to clarify a record and clean things up going into the appeal, but in the event that the Supreme Court ultimately does not want to have the jury reconvene, I think that this also something that we could revisit, the NRCP 49(a) issue that had been addressed way back in our initial motion for entry of judgment as to both Defendants.

So to the extent that we get there -- you know, hopefully, that's something that's also on everybody's radar and just something that we had wanted to mention because, you know, it can get a little -- a little bit messy with the way that this whole case went after the fact, and what should've been a basic administrative matter, it's kind of gotten messy. So we just wanted also to put that on everyone's radar going forward.

THE COURT: I'll agree on that last one.

MS. WILDE: Thank you, Your Honor.

THE COURT: All right. Anything else, Mr. Kennedy?

MR. KENNEDY: No, Your Honor. We'll submit it.

THE COURT: All right. Great. So I'm going to get a written decision to on that.

[Court and Clerk confer]

THE COURT: I should have that order out to you today. I just -- there were just a couple things I was editing, and then we'll see what happens.

MR. KENNEDY: Okay. Thank Your Honor.

MR. CLOWARD: Thank you, Judge Bell.

MS. WILDE: Thank you.

MR. ECHOLS: Have a nice day.

THE COURT: You, too.

[Proceeding concluded at 9:38 a.m.]

ATTEST: I do hereby certify that I have truly and correctly transcribed the audio-visual recording of the proceeding in the above entitled case to the best of my ability.

Renee Vincent

Renee Vincent, Court Recorder/Transcriber

DAO

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

AARON M. MORGAN, INDIVIDUALLY,

Plaintiff,

vs.

DAVID E. LUJAN, individually, HARVEST MANAGEMENT SUB LLC; a Foreign-Limited Liability Company; DOES 1 THROUGH 20; ROE BUSINESS ENTITIES 1 THROUGH 20, inclusive Jointly and Severally,

Defendants.

Case No. A-15-718679-C

Dept. No. VII

DECISION AND ORDER

Defendant Harvest Management Sub LLC filed a Motion for Entry of Judgment because Aaron Morgan failed to properly pursue his claim of vicarious liability against them and abandoned his claim. This Motion followed a similar Motion for Entry of Judgment filed by Mr. Morgan that Judge Gonzalez denied. Mr. Morgan filed a Motion for Attorney Fees and Costs, arguing Harvest should pay attorney fees as a result of Harvest causing a mistrial. Upon review of the Motions, Oppositions, and Replies, as well as in consideration of the points made in oral argument, I find that I am without jurisdiction to render a decision on the Motion for Entry of Judgment and will stay proceedings until the appeal pending is resolved. I certify that should the Supreme Court remand the case back to me, I will recall the jury and instruct them to consider whether their verdict applied to Harvest. For the fees, I find that it would be a waste of judicial economy to rule on the fees at this point, and will defer judgment until the Supreme Court makes its decision.

I. Factual and Procedural Background

This case involves a car accident in which David Lujan, a driver for Harvest, struck Mr. Morgan. Mr. Morgan sustained injuries as a result of this accident. Mr. Morgan filed a Complaint on May 05, 2015. Mr. Morgan levied several causes of action against the Defendants. Mr. Morgan claimed negligence and negligence per se against David Lujan and vicarious liability/respondeat

LINDA MARIE BELL
DISTRICT JUDGE
DEPARTMENT VII

superior against Harvest. Mr. Morgan claimed that Mr. Lujan was acting in the scope of his employment with Harvest when he caused an accident to occur, injuring Mr. Morgan.

On June 16, 2015, the Defendants filed an Answer to Mr. Morgan's Complaint. The Answer denied the allegation that Mr. Lujan was acting in the course and scope of his employment at the time of the accident. Harvest further denied that Mr. Lujan was incompetent, inexperience, or reckless in the operation of the vehicle, that Harvest knew or should have known Mr. Lujan was incompetent, inexperienced, or reckless in the operation of the vehicle, that Mr. Morgan was injured as a proximate cause of Harvest's negligent entrustment of the vehicle to Mr. Lujan, and that Mr. Morgan suffered damages as a direct and proximate result of Harvest's negligent entrustment. Defendants were represented by Douglas J. Gardner, Esq. of Rands, South, & Gardner who represented both Defendants throughout the discovery process.

On April 24, 2017, the parties appeared for a jury trial. The Defendant advised me that Mr. Lujan had been hospitalized. I continued this jury trial. On November 6, 2017, the parties conducted a second jury trial. This trial ended in a mistrial as a result of the Defendants inquiring about the pending DUI charge against Mr. Morgan. On April 2, 2018, the parties held the second trial. During this trial, the parties failed to provide a verdict form. Instead, the parties agreed to use a verdict form that had been used in a prior trial and was modified by my assistant. I did not catch, nor did any of the four attorneys, that the verdict form inadvertently omitted Harvest from the caption. The form also designated a singular "Defendant" instead of referring to multiple Defendants. Using this flawed form, the jury awarded Mr. Morgan $2,980,000.00 in damages. I did not make any legal determination regarding Harvest. I also do not recall Harvest contesting vicarious liability during any of the three trials or during the two years proceeding.

On July 30, 2018, Mr. Morgan filed a Motion for Entry of Judgment requesting the Court enter a written judgment against both Lujan and Harvest Management. The Court ruled that the inconsistencies in the jury instructions and the special verdict form were not enough to support judgment against Harvest. Mr. Morgan appealed on December 18, 2018. This matter is currently pending before the Nevada Supreme Court.

LINDA MARIE BELL
DISTRICT JUDGE
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On December 21, 2019, Harvest filed a Motion for Entry of Judgment based on the decision made on Mr. Morgan's Motion for Entry of Judgment. Harvest argues that this decision warrants an immediate judgment in its favor. Mr. Morgan filed an opposition and Countermotion on January 15, 2019. Harvest filed a Reply on January 23, 2019. I heard oral arguments on March 05, 2019.

Mr. Morgan filed a Motion for Attorney's Fees and Costs on January 22, 2019. Harvest filed an Opposition on February 22, 2019. Mr. Morgan filed a Reply on March 08, 2019. I heard oral arguments on March 19, 2019.

II. Discussion

Harvest makes the following arguments in support of its Motion:

(1) Mr. Morgan voluntarily abandoned his claim against Harvest and did not present any claims against Harvest to the jury for determination.

(2) Harvest is entitled to judgment in its favor as to Mr. Morgan's claim for either negligent entrustment or vicarious liability.

Before I can address these arguments, I must first address whether I have jurisdiction to hear this case. The pending appeal by Mr. Morgan may affect my ability to adjudicate this matter.

A. The pending appeal by Mr. Morgan divests this Court of jurisdiction.

The Supreme Court of Nevada held that a "timely notice of appeal divests the district court of jurisdiction" to address issues pending before the Nevada Supreme Court. Mack-Manley v. Manley, 122 Nev. 849, 855-56, 138 P.3d 525, 530 (2006). I may only adjudicate "matters that are collateral to and independent from the appealed order, i.e., matters that in no way affect the appeal's merits." Id. at 855.

Mr. Morgan argues that the pending appeal divests this Court of jurisdiction to hear matters related to the Order Denying Mr. Morgan's Motion for Entry of Judgment, the Jury Verdict, or related substantive issues. Harvest argues that the Order denying the Motion for Entry of Judgment is not a final order because there is an issue remaining against Harvest. Harvest concludes that if the Order denying the motion for Entry of Judgment is not a final order, the Supreme Court does not have jurisdiction.

The Supreme Court could find that Mr. Morgan's appeal has merit and may reverse the Order granting the Motion for Entry of Judgment. This would grant Mr. Morgan a judgment against Harvest and render Harvest's current Motion moot. Thus, this Motion is not collateral and independent. This Motion directly stems from Judge Gonzalez denying Mr. Morgan's Motion for Entry of Judgment.

Substantively, I agree with Harvest that the flawed verdict form used at trial does not support a verdict against Harvest. Pursuant to Huneycutt v. Huneycutt, I certify that if this case was remanded, I would recall the jury from the subject trial and instruct them to consider whether their verdict applied to Harvest. 94 Nev. 79, 575 P.2d 585 (1978).

B. As the pending Supreme Court decision impacts liability, I am deferring judgment until the resolution of the appeal on the Motion for attorney fees.

I have jurisdiction to resolve attorney fees. I find that it is against the interest of judicial economy to resolve the issue at this time. Mr. Morgan seeks $47,250.00 in fees and $20,371.40 in costs for the mistrial. Mr. Morgan also seeks $42,070.75 for costs incurred in the completed jury trial. While the pending Supreme Court decision does not directly consider these pending fees and costs, the decision will impact who could be responsible for some of these fees and costs. In addition, the parties seemed to indicate that, depending on the Supreme Court decision, further Motions for Attorney Fees could be warranted. Judicial economy would best be served if all requests for fees and costs were handled at the same time after all variables are accounted for.

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DISTRICT JUDGE
DEPARTMENT VII

III. Conclusion

The current Motion in front of me directly relates to the appeal pending before the Supreme Court. I am without jurisdiction to adjudicate this matter. I am staying proceedings until the appeal is resolved and certify that if this were remanded back to me, I would recall the jury and instruct them to consider whether Harvest is liable. I am also deferring judgment on attorney fees and costs. The parties may place this back on calendar when the Nevada Supreme Court renders its opinion.

DATED this 2 day of April, 2019.

LINDA MARIE BELL
DISTRICT COURT JUDGE

LINDA MARIE BELL
DISTRICT JUDGE
DEPARTMENT VII

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the date of filing, a copy of this Order was electronically served through the Eighth Judicial District Court EFP system or, if no e-mail was provided, by facsimile, U.S. Mail and/or placed in the Clerk's Office attorney folder(s) for:

Name	Party
Micah S. Echols Marquis Aurbach Coffing Attn: Micah Echols 10001 Park Run Drive Las Vegas, NV 89145	Counsel for Plaintiff
Dennis L. Kennedy Bailey * Kennedy c/o Dennis L. Kennedy 8984 Spanish Ridge Avenue Las Vegas, NV 89148	Counsel for Harvest Management Sub LLC
Douglas J. Gardner 1055 Whitney Ranch Dr., Suite 220 Henderson, NV 89014	Counsel for David Lujan

SYLVIA PERRY
JUDICIAL EXECUTIVE ASSISTANT, DEPARTMENT VII

AFFIRMATION

Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding Decision and Order filed in District Court case number A718679 **DOES NOT** contain the social security number of any person.

/s/ Linda Marie Bell
District Court Judge

Date: ~~03/7/2019~~ 4/2/19

LINDA MARIE BELL
DISTRICT JUDGE
DEPARTMENT VII

Case No. _____

IN THE SUPREME COURT OF NEVADA

HARVEST MANAGEMENT SUB LLC,
Petitioner,

vs.

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

- and -

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

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

PETITION FOR EXTRAORDINARY WRIT RELIEF

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April 18, 2019

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IN THE SUPREME COURT OF THE STATE OF NEVADA

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

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NRAP 26.1 DISCLOSURE

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

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

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

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

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

DATED this 18th day of April, 2019.

BAILEY❖KENNEDY

By: _/s/ Dennis L. Kennedy_____
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CERTIFICATE OF SERVICE

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

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VIA HAND DELIVERY:

Respondent

HONORABLE LINDA MARIE BELL
EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK
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/s/ Josephine Baltazar
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PETITION FOR EXTRAORDINARY WRIT RELIEF

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

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

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

DATED this 18th day of April, 2019.

BAILEY❖KENNEDY

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

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

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

II. INTRODUCTION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III. SUMMARY OF REASONS WHY EXTRAORDINARY WRIT RELIEF IS PROPER

A. Standard of Decision for Seeking Writ Relief.

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

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

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

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

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

B. Writ Relief Is Appropriate Here.

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

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

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

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

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

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

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

IV. RELIEF REQUESTED

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

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

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

V. TIMING OF THIS PETITION

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

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

VI. ISSUES PRESENTED FOR REVIEW

This Petition presents the following issues:

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

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

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VII. STATEMENT OF FACTS NECESSARY TO UNDERSTAND THE ISSUES PRESENTED

A. The Accident.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

/ / /

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

/ / /

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

7. The Verdict.

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

G. The Action Was Reassigned to Department XI.

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

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

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

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

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

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

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

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

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

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

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

I. Mr. Morgan's Appeal.

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

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

Mr. Morgan has identified three issues on appeal:

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

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

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

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

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J. Harvest's Motion for Entry of Judgment.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

VIII. REASONS WHY A WRIT SHOULD ISSUE

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

D. Judgment Should Be Entered in Favor of Harvest.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

IX. CONCLUSION

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

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

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

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

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

DATED this 18th day of April, 2019.

BAILEY❖KENNEDY

By: _/s/ Dennis L. Kennedy_____
DENNIS L. KENNEDY
SARAH E. HARMON
ANDREA M. CHAMPION

Attorneys for Petitioner
HARVEST MANAGEMENT SUB LLC

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VERIFICATION

STATE OF OREGON)

COUNTY OF Multnomah

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

EXECUTED on this 17th day of April, 2019.

Michele Stone

MICHELE STONE

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NRAP 28.2 CERTIFICATE OF COMPLIANCE

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

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

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

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

DATED this 18th day of April, 2019.

BAILEY❖KENNEDY

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

Attorneys for Petitioner
HARVEST MANAGEMENT SUB LLC

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CERTIFICATE OF SERVICE

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

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VIA HAND DELIVERY:

HONORABLE LINDA MARIE BELL
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Employee of BAILEY❖KENNEDY

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ADDENDUM

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

N.R.S. Const. Art. 6, § 4

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

Currentness

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

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

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

Credits

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

No. 14.

Notes of Decisions (184)

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

End of Document

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

N.R.S. 34.160

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

Effective: January 1, 2015

Currentness

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

Credits

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

Notes of Decisions (438)

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

End of Document

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

N.R.S. 34.170

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

Currentness

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

Credits

Added by CPA (1911), § 754.

Notes of Decisions (175)

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

End of Document

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

Nevada Rules of Appellate Procedure, Rule 3A

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

Currentness

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Credits

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

Editors' Notes

ADVISORY COMMITTEE NOTES

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

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

Notes of Decisions (202)

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

End of Document

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

Nevada Rules of Appellate Procedure, Rule 17

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

Currentness

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

(1) All death penalty cases;

(2) Cases involving ballot or election questions;

(3) Cases involving judicial discipline;

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

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

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

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

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

(9) Cases originating in business court;

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

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

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

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

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

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

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

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

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

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

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

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

(7) Appeals from postjudgment orders in civil cases;

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

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

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

(11) Appeals challenging venue;

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

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

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

(15) Cases arising from the foreclosure mediation program.

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

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

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

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

Credits

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

Editors' Notes

COMMENTS

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

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

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

Nevada Rules of Appellate Procedure, Rule 21

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

Currentness

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

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

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

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

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

(B) the relief sought;

(C) the issues presented;

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

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

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

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

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

(b) Denial; Order Directing Answer.

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

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

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

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

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

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

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

Credits

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

Editors' Notes

ADVISORY COMMITTEE NOTES

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

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

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

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

Notes of Decisions (37)

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

End of Document

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

Rules of Civil Procedure, Rule 30

Rule 30. Depositions by Oral Examination

Currentness

(a) When a Deposition May Be Taken.

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

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

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

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

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

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

(B) if the deponent is confined in prison.

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

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

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

(3) *Method of Recording.*

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

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

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

(5) *Officer's Duties.*

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

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

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

(iii) the deponent's name;

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

(v) the identity of all persons present.

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

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

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

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

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

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

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

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

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

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

(3) *Motion to Terminate or Limit.*

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

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

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

(e) Review by the Witness; Changes.

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

(A) to review the transcript or recording; and

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

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

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

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

(2) *Documents and Tangible Things.*

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

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

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

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

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

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

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

(1) attend and proceed with the deposition; or

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

(h) Expert Witness Fees.

(1) *In General.*

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

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

(2) *Advance Request; Balance Due.*

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

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

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

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

(4) *Objections.*

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

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

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

Credits

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

Editors' Notes

ADVISORY COMMITTEE NOTES

2019 Amendment

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

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

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

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

Notes of Decisions (18)

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

End of Document

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

Rules of Civil Procedure, Rule 49

Rule 49. Special Verdict; General Verdict and Questions

Currentness

(a) Special Verdict.

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

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

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

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

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

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

(b) General Verdict With Answers to Written Questions.

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

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

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

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

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

(C) order a new trial.

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

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

(B) order a new trial.

Credits

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

Notes of Decisions (17)

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

End of Document

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

Rules of Civil Procedure, Rule 54

Rule 54. Judgments; Attorney Fees

Currentness

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

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

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

(d) Attorney Fees.

(1) *Reserved.*

(2) *Attorney Fees.*

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

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

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

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

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

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

(v) be supported by:

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

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

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

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

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

Credits

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

Editors' Notes

ADVISORY COMMITTEE NOTES

2019 Amendment

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

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

Notes of Decisions (117)

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

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

Rules of Civil Procedure, Rule 59

Rule 59. New Trials; Amendment of Judgments

Currentness

(a) In General.

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

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

(B) misconduct of the jury or prevailing party;

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

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

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

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

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

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

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

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

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

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

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

Credits

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

Editors' Notes

ADVISORY COMMITTEE NOTES

2019 Amendment

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

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

Notes of Decisions (182)

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

End of Document

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

Rules of Civil Procedure, Rule 60

Rule 60. Relief from a Judgment or Order

Currentness

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

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

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

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

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

(4) the judgment is void;

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

(6) any other reason that justifies relief.

(c) Timing and Effect of the Motion.

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

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

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

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

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

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

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

Credits

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

Editors' Notes

ADVISORY COMMITTEE NOTES

2019 Amendment

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

Notes of Decisions (323)

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

End of Document

IN THE SUPREME COURT OF THE STATE OF NEVADA

HARVEST MANAGEMENT SUB LLC,
Petitioner,
vs.
THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE LINDA MARIE BELL,
Respondents,
and
AARON M. MORGAN; AND DAVID E. LUJAN,
Real Parties in Interest.

No. 78596

ORDER DENYING PETITION FOR WRIT OF MANDAMUS

This original petition for a writ of mandamus challenges a district court order denying a motion for entry of judgment.

Having considered the petition and supporting documentation, we are not persuaded that our extraordinary and discretionary intervention is warranted at this time. *Pan v. Eighth Judicial Dist. Court*, 120 Nev. 222, 228, 88 P.3d 840, 844 (2004) (observing that the party seeking writ relief bears the burden of showing such relief is warranted); *Smith v. Eighth Judicial Dist. Court*, 107 Nev. 674, 677, 679, 818 P.2d 849, 851, 853 (1991) (recognizing that writ relief is an extraordinary remedy and that this court has sole discretion in determining whether to entertain a writ petition). Accordingly, we deny petitioner's request for writ relief. We clarify that this denial is without prejudice to petitioner's ability to seek writ relief again if subsequent steps are taken to reconvene the jury. *Cf. Sierra Foods v. Williams*, 107 Nev. 574, 576, 816 P.2d 466, 467 (1991) ("[T]he general rule

in many jurisdictions is that a trial court is without authority or jurisdiction to reconvene a jury once it has been dismissed . . . .").

It is so ORDERED.

_____, C.J.
Gibbons

_____, J.
Stiglich

_____, J.
Silver

cc: Hon. Linda Marie Bell, Chief Judge
Bailey Kennedy
Richard Harris Law Firm
Rands & South & Gardner/Reno
Rands, South & Gardner/Henderson
Marquis Aurbach Coffing
Eighth District Court Clerk

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; DAVID E. LUJAN,

Real Parties in Interest.

Case No. 81975

PETITIONER'S APPENDIX, VOLUME 27
(Nos. 4127–4309)

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IN THE SUPREME COURT OF THE STATE OF NEVADA

AARON M. MORGAN, individually, Appellant, vs. DAVID E. LUJAN, individually; and HARVEST MANAGEMENT SUB LLC, a foreign limited-liability company, Respondents.	Supreme Court No. 77753 District Court No. A-15-718679-C **RESPONDENT HARVEST MANAGEMENT SUB LLC'S RENEWED MOTION TO DISMISS APPEAL AS PREMATURE**

RESPONDENT HARVEST MANAGEMENT SUB LLC'S RENEWED[1] MOTION TO DISMISS APPEAL AS PREMATURE

Respondent Harvest Management Sub LLC ("Harvest"), by and through its attorneys, the law firm of Bailey❖Kennedy, hereby moves to dismiss the Notice of Appeal filed by Appellant Aaron M. Morgan ("Mr. Morgan") on December 18, 2018. Mr. Morgan's Notice of Appeal is premature, as the district court has not yet entered a final judgment in the underlying action. Specifically, Mr. Morgan's claim against Harvest remains pending, subject to the district court's resolution of Harvest's Motion for Entry of Judgment, which has been pending since December 21, 2018. Moreover, Mr. Morgan did not seek Nevada Rule of Civil Procedure 54(b) certification for the order or judgment appealed from. As such, this Court lacks jurisdiction over the appeal, and Harvest respectfully requests that this Court: (1) dismiss the appeal; and (2) remand the action to the District Court ***with instructions to***

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[1] On January 23, 2019, Harvest moved to dismiss this appeal for lack of jurisdiction. On March 7, 2019, this Court denied the motion without prejudice, pending the completion of the mandatory settlement program. On August 19, 2019, a Settlement Program Status Report was filed, stating that the parties were unable to reach a settlement.

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enter judgment in favor of Harvest, as is consistent with the district court's prior order denying Mr. Morgan a judgment against Harvest.

DATED this 19th day of August, 2019.

BAILEY❖KENNEDY

By*: /s/ Dennis L. Kennedy*
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MEMORANDUM OF POINTS AND AUTHORITIES

I. STATEMENT OF FACTS

On May 20, 2015, Mr. Morgan filed a Complaint against Harvest and Respondent David E. Lujan ("Mr. Lujan"). (Ex. 1.[2]) Mr. Morgan alleged claims for negligence and negligence per se against Mr. Lujan, and a claim for negligent entrustment against Harvest.[3] (Ex. 1, at 3:1-4:12.) In April 2018, this underlying case was tried to a jury, and the only claims presented to the

/ / /

[2] Compl. (May 20, 2015), attached hereto as Exhibit 1.

[3] The claim against Harvest is erroneously titled "vicarious liability/ respondeat superior," but it is clearly a claim for negligent entrustment.

jury for determination were the claims of negligence and negligence per se alleged against Mr. Lujan. (Ex. 2.[4])

On July 30, 2018, Mr. Morgan filed a Motion for Entry of Judgment seeking to have the jury's verdict against Mr. Lujan applied against Harvest — despite the fact that no claim for relief against Harvest was proven at trial or presented to the jury for determination — pursuant to NRCP 49(a). (Ex. 3[5]; Ex. 4.[6]) On November 28, 2018, the district court denied Mr. Morgan's Motion, holding that the failure to include the claim against Harvest in the Special Verdict form was not a "clerical error," that no claim against Harvest had been presented to the jury for determination, and that a judgment could not be entered against Harvest based on the jury's verdict. (Ex. 5[7]; Ex. 6,[8] at 9:8-20.) Further, when Harvest sought clarification whether the judgment against

[4] Special Verdict (Apr. 9, 2018), attached hereto as Exhibit 2.

[5] Pl.'s Mot. for Entry of J. (July 30, 2018), attached hereto as Exhibit 3. The exhibits to this motion have been omitted in the interest of judicial economy and efficiency.

[6] Def. Harvest Management Sub LLC's Opp'n to Pl.'s Mot. for Entry of J. (Aug. 16, 2018), attached hereto as Exhibit 4. The exhibits to this motion have been omitted in the interest of judicial economy and efficiency.

[7] Notice of Entry of Order on Pl.'s Mot. for Entry of J. (Nov. 28, 2018), attached hereto as Exhibit 5.

[8] Tr. of the Hr'g on Pl.'s Mot. for Entry of J. (Jan. 18, 2019), excerpts of which are attached as Exhibit 6.

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Mr. Lujan would also dismiss all claims alleged against Harvest, the district court explicitly instructed Harvest that it would have to file a motion seeking such relief. (Ex. 6, at 9:18-10:8.)

On December 17, 2018, Mr. Morgan filed a Judgment Upon the Jury Verdict against Mr. Lujan. (Ex. 7.[9]) On December 18, 2018, Mr. Morgan filed a Notice of Appeal from the November 28, 2018 Notice of Entry of Order Denying Plaintiff's Motion for Entry of Judgment and from the December 17, 2018 Judgment Upon the Jury Verdict. (Ex. 8.[10])

On December 21, 2018, Harvest filed a Motion for Entry of Judgment against Mr. Morgan as to the claim for relief that he seemingly abandoned and/or failed to prove at trial. (Ex. 9.[11]) On April 5, 2019, the District Court determined that, as a result of this appeal, it lacked jurisdiction to decide Harvest's Motion for Entry of Judgment and that it would stay proceedings pending resolution of the appeal. (Ex. 10,[12] at 1:16-19, 5:1-4.) The District

[9] Notice of Entry of J. Upon the Jury Verdict (Jan. 2, 2019), attached as Exhibit 7.

[10] Notice of Appeal (Dec. 18, 2018), attached as Exhibit 8.

[11] Def. Harvest Mgmt. Sub LLC's Mot. for Entry of J. (Dec. 21, 2018), attached as Exhibit 9. The exhibits to the motion have been omitted in the interest of judicial economy and efficiency.

[12] Decision & Order (April 5, 2019), attached as Exhibit 10.

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Court also indicated that if this Court remands the action, it would "recall the jury [discharged and dismissed over sixteen months ago] and instruct them to consider whether their verdict applied to Harvest." (*Id.* at 1:19-21, 4:7-9, 5:4-5.) As a result, Harvest filed a Petition for Extraordinary Writ Relief from this Decision & Order, and on May 15, 2019, this Court issued an Order denying the Petition, without prejudice, should the district court take any steps to reconvene the jury. (Ex. 11,[13] at 1.)

On May 15, 2019, Mr. Morgan filed a Motion for Remand Pursuant to NRAP 12A, asserting that the action should be remanded so that the District Court could enter judgment against Harvest pursuant to NRCP 49(a). (Ex. 12.[14]) Harvest opposed the Motion for Remand: (1) stating that the district court had already denied Mr. Morgan's attempt to obtain a judgment against Harvest pursuant to NRCP 49(a); (2) pointing out that the district court never issued an indicative ruling that it would grant NRCP 49(a) relief; and (3) demonstrating that NRCP 49(a) is not an instrument for determining the

[13] Order Denying Petition for Writ of Mandamus (May 15, 2019), attached as Exhibit 11.

[14] Mot. for Remand Pursuant to NRAP 12A (May 15, 2019), attached as Exhibit 12.

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ultimate issue of liability where a party has utterly failed to present a claim for the jury's determination. (Ex. 13,[15] at 1:9-2:4.) On July 31, 2018, this Court denied the Motion for Remand, citing NRCP 49(a) and *Kinnel v. Mid-Atlantic Mausoleums, Inc.*, 850 F.2d 958 (3rd Cir. 1988) (a case raised in Harvest's Opposition brief) in support of the Court's finding that remand was not warranted. (*Id.* at 7:13-9:7; Ex. 14.[16])

II. ARGUMENT

Nevada Rule of Appellate Procedure 3A sets forth the judgments and orders from which a party may appeal. An order denying entry of judgment is not an appealable order under the Rules, and only final judgments (or interlocutory judgments in certain real property actions) are appealable. NRAP 3A(b)(1).

It is well-settled that "when multiple parties are involved in an action, a judgment is not final unless the rights and liabilities of all parties are adjudicated." *Rae v. All Am. Life & Cas. Co.*, 95 Nev. 920, 922, 605 P.2d 196,

[15] Respondent Harvest Mgmt. Sub LLC's Opp'n to Mot. for Remand Pursuant to NRAP 12A (May 17, 2019), attached as Exhibit 13.

[16] Order Denying Remand (July 31, 2019), attached as Exhibit 14.

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197 (1979); *see also Lee v. GNLV Corp.*, 116 Nev. 424, 426, 996 P.2d 416, 417 (2000) ("[A] final judgment is one that disposes of all issues presented in the case, and leaves nothing for the future consideration of the court, except for post-judgment issues such as attorney's fees and costs."). When a judgment disposes of less than all of the claims against all of the parties, a party must seek certification of the judgment as final pursuant to Nevada Rule of Civil Procedure 54(b) before it can file an appeal from the judgment. "*In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the parties* . . . ." NRCP 54(b) (emphasis added).

Here, neither the Order Denying Plaintiff's Motion for Entry of Judgment ("Order") nor the Judgment Upon Jury Verdict ("Judgment"), individually or considered together, constitutes a final judgment. Neither the Order nor the Judgment disposes of all of the claims in the case. Mr. Morgan's claim against Harvest remains unresolved and is the subject of a pending Motion for Entry of Judgment in the district court. Mr. Morgan failed to seek

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Rule 54(b) certification for either the Order or the Judgment prior to filing his Notice of Appeal. Therefore, Mr. Morgan's appeal is premature and this Court lacks jurisdiction to hear the appeal.

In light of the District Court's prior ruling that the jury's verdict against Mr. Lujan did not apply to Harvest, and this Court's indication in the Order Denying Remand that NRCP 49(a) is not the proper method by which to enter a judgment against Harvest, Harvest respectfully requests that upon dismissal of this appeal, this Court instruct the District Court to enter judgment in favor of Harvest, as is consistent with these prior rulings.

II. CONCLUSION

For the foregoing reasons, Mr. Morgan's appeal should be dismissed as premature. Mr. Morgan has failed to appeal from a final judgment. This action should be remanded with instructions to enter judgment in favor of

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Harvest as to the claim that Mr. Morgan failed to present to the jury for determination.

DATED this 19th day of August, 2019.

BAILEY❖KENNEDY

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

Attorneys for Respondent
HARVEST MANAGEMENT SUB LLC

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CERTIFICATE OF SERVICE

I certify that I am an employee of BAILEY❖KENNEDY and that on the 19th day of August, 2019, service of the foregoing **RESPONDENT HARVEST MANAGEMENT SUB LLC'S RENEWED MOTION TO DISMISS APPEAL AS PREMATURE** was made by electronic service through 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 TOM W. STEWART **MARQUIS AURBACH COFFING** 1001 Park Run Drive Las Vegas, Nevada 89145	Email: mechols@maclaw.com tstewart@maclaw.com *Attorneys for Appellant* AARON M. MORGAN
BENJAMIN P. CLOWARD BRYAN A. BOYACK **RICHARD HARRIS LAW FIRM** 801 South Fourth Street Las Vegas, Nevada 89101	Email: Bbenjamin@richardharrislaw.com bryan@richardharrislaw.com *Attorneys for Appellant* AARON M. MORGAN
DOUGLAS J. GARDNER DOUGLAS R. RANDS **RANDS, SOUTH & GARDNER** 1055 Whitney Ranch Drive, Suite 220 Henderson, Nevada 89014	Email: dgardner@rsglawfirm.com drands@rsgnvlaw.com *Attorneys for Respondent* DAVID E. LUJAN

/s/ Josephine Baltazar
Employee of BAILEY❖KENNEDY

EXHIBIT 1

EXHIBIT 1

COMP
ADAM W. WILLIAMS, ESQ.
Nevada Bar No. 13617
RICHARD HARRIS LAW FIRM
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Las Vegas, NV 89101
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Attorneys for Plaintiff

DISTRICT COURT

CLARK COUNTY, NEVADA

AARON M. MORGAN, individually Plaintiff, vs. DAVID E. LUJAN, individually; HARVEST MANAGEMENT SUB LLC; a Foreign Limited-Liability Company; DOES 1 through 20; ROE BUSINESS ENTITIES 1 through 20, inclusive jointly and severally, Defendants.	CASE NO.: A-15-718679-C DEPT. NO.: VII **COMPLAINT**

RICHARD HARRIS LAW FIRM

COMES NOW, Plaintiff AARON M. MORGAN, individually, by and through his attorney of record ADAM W. WILLIAMS, ESQ. of the RICHARD HARRIS LAW FIRM, and complains and alleges as follows:

JURISDICTION

1. That at all times relevant herein, Plaintiff AARON M. MORGAN (hereinafter referred to as "Plaintiff") is, a resident of Clark County, Nevada.
2. That at all times relevant herein, Defendant, DAVID E. LUJAN was, and is, a resident of Clark County, Nevada.

3. That at all times relevant herein, Defendant, HARVEST MANAGEMENT SUB LLC, was, and is, a foreign limited-liability Company licensed and actively conducting business in Clark County, Nevada

4. All the facts and circumstances that gave rise to the subject lawsuit occurred in Clark County, Nevada.

5. The identities of Defendant DOES 1 through 20, and ROE BUSINESS ENTITIES 1 through 20, are unknown at this time and are individuals, corporations, associations, partnerships, subsidiaries, holding companies, owners, predecessor or successor entities, joint venturers, parent corporations or related business entities of Defendants, inclusive, who were acting on behalf of or in concert with, or at the direction of Defendants and are responsible for the injurious activities of the other Defendants.

6. Plaintiff alleges that each named and Doe and Roe Defendant negligently, willfully, intentionally, recklessly, vicariously, or otherwise, caused, directed, allowed or set in motion the injurious events set forth herein.

7. Each named and Doe and Roe Defendant is legally responsible for the events and happenings stated in this Complaint, and thus proximately caused injury and damages to Plaintiff.

8. Plaintiff requests leave of the Court to amend this Complaint to specify the Doe and Roe Defendants when their identities become known.

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

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FIRST CAUSE OF ACTION
Negligence Against Employee Defendant, DAVID E. LUJAN

10. Plaintiff incorporates paragraphs 1 through 9 of the Complaint as though said paragraphs were fully set forth herein.

11. Defendant DAVID E. LUJAN owed Plaintiff a duty of care. Defendant DAVID E. LUJAN breached that duty of care.

12. As a direct and proximate result of the negligence of Defendant, Plaintiff was seriously injured and caused to suffer great pain of body and mind, some of which conditions are permanent and disabling all to her general damage in an amount in excess of $10,000.00.

SECOND CAUSE OF ACTION
Negligence Per Se Against Employee Defendant, DAVID E. LUJAN

13. Plaintiff incorporates paragraphs 1 through 12 of the Complaint as though said paragraphs were fully set forth herein.

14. The acts of Defendant DAVID E. LUJAN as described herein violated the traffic laws of the State of Nevada and Clark County, constituting negligence per se, and Plaintiff has been damaged as a direct and proximate result thereof in an amount in excess of $10,000.00.

THIRD CAUSE OF ACTION
Vicarious Liability/Respondeat Superior Against Defendant HARVEST MANAGEMENT SUB LLC.

15. Plaintiff incorporates paragraphs 1 through 14 of the Complaint as though said paragraphs were fully set forth herein.

16. Plaintiff is informed and believes that DAVID E. LUJAN was employed as a driver for Defendant HARVEST MANAGEMENT SUB LLC.

17. At all times mentioned herein, Defendant HARVEST MANAGEMENT SUB LLC. was the owner of, or had custody and control of, the Vehicle.

18. That Defendant HARVEST MANAGEMENT SUB LLC. did entrust the Vehicle to the control of Defendant DAVID E. LUJAN.

19. That Defendant DAVID E. LUJAN was incompetent, inexperienced, or reckless in the operation of the Vehicle.

20. That Defendant HARVEST MANAGEMENT SUB LLC. actually knew, or by the exercise of reasonable care should have known, that Defendant DAVID E. LUJAN was incompetent, inexperienced, or reckless in the operation of motor vehicles.

21. That Plaintiff was injured as a proximate consequence of the negligence and incompetence of Defendant DAVID E. LUJAN, concurring with the negligent entrustment of the Vehicle by Defendant HARVEST MANAGEMENT SUB LLC..

22. That as a direct and proximate cause of the negligent entrustment of the Vehicle by Defendant HARVEST MANAGEMENT SUB LLC. to Defendant DAVID E. LUJAN, Plaintiff has been damaged in an amount in excess of $10,000.00.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for relief and judgment against Defendants as follows:

1. General damages in an amount in excess of $10,000.00;
2. Special damages for medical and incidental expenses incurred and to be incurred;
3. Special damages for lost earnings and earning capacity;
4. Attorney's fees and costs off suit incurred herein; and
5. For such other and further relief as the Court may deem just and proper.

DATED this 20 day of May, 2015.

RICHARD HARRIS LAW FIRM

ADAM W. WILLIAMS, ESQ.
Nevada Bar No. 13617
801 S. Fourth Street
Las Vegas, Nevada 89101
Attorneys for Plaintiff

EXHIBIT 2

EXHIBIT 2

DISTRICT COURT

CLARK COUNTY, NEVADA

CASE NO: A-15-718679-C

DEPT. NO: VII

AARON MORGAN,

Plaintiff,

vs.

DAVID LUJAN,

Defendant.

SPECIAL VERDICT

We, the jury in the above-entitled action, find the following special verdict on the questions submitted to us:

QUESTION NO. 1: Was Defendant negligent?

ANSWER: Yes ✓ No _____

If you answered no, stop here. Please sign and return this verdict.

If you answered yes, please answer question no. 2.

QUESTION NO.2: Was Plaintiff negligent?

ANSWER: Yes _____ No ✓

If you answered yes, please answer question no. 3.

If you answered no, please skip to question no. 4.

///

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QUESTION NO. 3: What percentage of fault do you assign to each party?

Defendant: 100

Plaintiff: 0

Total: 100%

Please answer question 4 without regard to you answer to question 3.

QUESTION NO. 4: What amount do you assess as the total amount of Plaintiff's damages? (Please do not reduce damages based on your answer to question 3, if you answered question 3. The Court will perform this task.)

Past Medical Expenses	$ 208,480.00
Future Medical Expenses	$ 1,156,500.00
Past Pain and Suffering	$ 116,000.00
Future Pain and Suffering	$ 1,500,000.00
TOTAL	$ 2,980,980.00

DATED this 9th day of April, 2018.

Arthur J. St. Laurent

FOREPERSON

ARTHUR J. ST. LAURENT

H000816

EXHIBIT 3

EXHIBIT 3

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Attorneys for Plaintiff, Aaron M. Morgan

DISTRICT COURT

CLARK COUNTY, NEVADA

AARON M. MORGAN, individually, Plaintiff, vs. DAVID E. LUJAN, individually; HARVEST MANAGEMENT SUB LLC; a Foreign Limited-Liability Company; DOES 1 through 20; ROE BUSINESS ENTITIES 1 through 20, inclusive jointly and severally, Defendants.	Case No.: A-15-718679-C Dept. No.: XI

PLAINTIFF'S MOTION FOR ENTRY OF JUDGMENT

Plaintiff, Aaron M. Morgan, in this matter, by and through his attorneys of record, Benjamin P. Cloward, Esq. and Bryan A. Boyack, Esq., of the Richard Harris Law Firm, and Micah S. Echols, Esq. and Tom W. Stewart, Esq., of Marquis Aurbach Coffing, hereby files Plaintiff's Motion for Entry of Judgment. This motion is made and based on the papers and

pleadings on file herein, the attached memorandum of points and authorities, and the oral argument before the Court.

NOTICE OF MOTION

You and each of you, will please take notice that **PLAINTIFF'S MOTION FOR ENTRY OF JUDGMENT** will come on regularly for hearing on the 04 day of Sept., 2018 at the hour of 9:00 A.m. or as soon thereafter as counsel may be heard, in Department 11 in the above-referenced Court.

Dated this ___ day of July, 2018.

MARQUIS AURBACH COFFING

By_____
Micah S. Echols, Esq.
Nevada Bar No. 8437
Tom W. Stewart, Esq.
Nevada Bar No. 14280
10001 Park Run Drive
Las Vegas, Nevada 89145
Attorneys for Plaintiff, Aaron M. Morgan

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

On April 9, 2018, a Clark County jury rendered judgment in favor of Plaintiff, Aaron Morgan ("Morgan"), and against Defendants, David Lujan ("Lujan") and Harvest Management Sub LLC ("Harvest Management"), in the amount of $2,980,980.00, plus pre- and post-judgment interest.[1] It was undisputed during trial that Lujan was acting within the course and scope of his employment with Harvest Management at the time of the traffic accident at the center of the case. All evidence and testimony indicated Morgan sought relief from, and that judgment would be entered against, both Defendants. However, the special verdict form prepared by the Court (the "special verdict form") inadvertently omitted Harvest Management from the caption, despite Harvest Management being listed on the pleadings and jury instructions upon which the jury

[1] *See* Special Verdict, attached as **Exhibit 1**.

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relied when reaching the verdict itself. The Court acknowledged this omission, and Defendants conceded they had no objection to it. Accordingly, Morgan respectfully requests this Court enter judgment against both Defendants, in accordance with the jury instructions, pleadings, testimony, and evidence, either by (a) simply entering the proposed judgment attached hereto or, (b) by making an explicit finding that the judgment was rendered against both Defendants pursuant to NRCP 49(a) and then entering judgment accordingly.[2]

II. FACTUAL BACKGROUND

On April 1, 2014, Morgan was driving his Ford Mustang north on McLeod Drive in the right lane. Morgan approached the intersection with Tompkins Avenue. At that time, Lujan, who was driving a shuttle bus owned by Harvest Management, entered the intersection driving east from the Paradise Park driveway, and attempted to cross McLeod Drive heading east on Tompkins Avenue. The front of Morgan's car struck the side of Defendants' bus in a major collision resulting in total loss of Morgan's vehicle and serious bodily injuries. Morgan was transported from the scene of the accident to Sunrise Hospital. The emergency room physicians focused on potential head trauma and injuries to the cervical spine and to Morgan's wrists. Morgan was eventually discharged with instructions to follow up with a primary care physician. A week later, Morgan sought treatment for pain in his neck, lower-back, and both wrists.

Over the next two years, Morgan underwent a series of treatments and procedures for his injuries—including bilateral medial branch block injections to his thoracic spine; injections to ease the pain from his bilateral triangular fibrocartilage tears; left wrist arthroscope and triangular fibrocartilage tendon repair with debridement, incurring approximately nearly $264,281.00 in medical expenses.

III. PROCEDURAL HISTORY

On May 5, 2015, Morgan filed a complaint for negligence and negligence per se against Lujan and vicarious liability against Harvest Management. In jointly answering the complaint, both Defendants were represented by the same counsel and both named in the caption.

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[2] *See* proposed Judgment Upon the Jury Verdict, attached as **Exhibit 2**.

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After a lengthy discovery period, the case initially proceeded to trial in early November, 2017. During the initial trial, Lujan testified that he was employed by Montara Meadows, a local entity under the purview of Harvest Management:

> [Morgan's counsel]: All right. Mr. Lujan, at the time of the accident in April of 2014, were you employed with Montara Meadows?
>
> [Lujan]: Yes.
>
> [Morgan's counsel]: And what was your employment?
>
> [Lujan]: I was the bus driver.
>
> [Morgan's counsel]: Okay. And what is your understanding of the relationship of Montara Meadows to Harvest Management?
>
> [Lujan]: Harvest Management was our corporate office.
>
> [Morgan's counsel]: Okay.
>
> [Lujan]: Montara Meadows is just the local --
>
> [Morgan's counsel]: Okay. All right. And this accident happened April 1, 2014, correct?
>
> [Lujan]: Yes, sir.[3]

However, on the third day of the initial trial, the Court declared a mistrial based on Defendants' counsel's misconduct.[4]

Following the mistrial, the case proceeded to a second trial the following April. Vicarious liability was not contested during trial. Instead, Harvest Management's NRCP 30(b)(6) representative contested primary liability—the representative claimed that either Morgan or an unknown third party was primarily responsible for the accident—but did not contest Harvest Management's own vicarious liability.[5]

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[3] Transcript of Jury Trial, November 8, 2017, attached as **Exhibit 3**, at 109 (direct examination of Lujan).

[4] *See* **Exhibit 3** at 166 (the Court granting Plaintiff's motion for mistrial); *see also* Court Minutes, November 8, 2017, attached as **Exhibit 4**.

[5] *See* Transcript of Jury Trial, April 5, 2018, attached as **Exhibit 5**, at 165–78 (testimony of Erica Janssen, NRCP 30(b)(6) witness for Harvest Management); Transcript of Jury Trial, April 6, 2018, attached as **Exhibit 6**, at 4–15 (same).

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On the final day of trial, the Court *sua sponte* created a special verdict form that inadvertently included Lujan as the only Defendant in the caption. The 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.
>
> [Defendants' 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.

At the end of the six-day jury trial, jury instructions were provided to the jury with the proper caption.[6] The jury used those instructions to fill-out the improperly-captioned special verdict form and render judgment in favor of Plaintiff—the jury found Defendants to be negligent and 100% at fault for the accident.[7] As a result, the jury awarded Plaintiff $2,980,000.[8]

IV. LEGAL ARGUMENT

This Court should enter the proposed Judgment on the Jury Verdict attached as **Exhibit 2**—it provides that judgment was rendered against both Lujan and Harvest Management because such a result conforms to the pleadings, evidence, and jury instructions upon which the jury relied in reaching the special verdict.

In the alternative, the Court should make an explicit finding pursuant to NRCP 49(a) that the special verdict was rendered against both Defendants and then enter judgment accordingly. NRCP 49(a) provides, in certain circumstances, the Court may make a finding on an issue not raised before a special verdict was rendered. Indeed, when a special verdict is used, "the court may submit to the jury written questions susceptible of categorical or other brief answer . . . which might properly be made under the pleadings and evidence." NRCP 49(a). Further, "[t]he court shall give to the jury such explanation and instruction concerning the matter

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[6] *See* Jury Instructions cover page, attached as **Exhibit 7**, at 1.

[7] *See* **Exhibit 1**.

[8] *Id.*

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thus submitted as may be necessary to enable the jury to make its findings upon each issue." *Id.* However, "[i]f in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives the right to a trial by jury of the issue so omitted unless before the jury retires the party demands its submission to the jury. *As to an issue omitted without such demand the court may make a finding*; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict." *Id.* (emphasis added).

Here, the record plainly supports judgment being rendered against both Defendants. However, should the Court wish to clarify the issue for the record, the Court should make an explicit finding that the omission of Harvest Management from the special verdict was inadvertent and, as a result, that judgment was rendered in favor of Morgan and both against Defendants, jointly and severally.

V. CONCLUSION

For the foregoing reasons, Plaintiff Aaron Morgan respectfully requests this Court enter the proposed Judgment on the Jury Verdict attached as **Exhibit 2**. In the alternative, Plaintiff requests this Court to make an explicit finding that judgment in this matter was rendered against both Defendants and then enter judgment accordingly.

Dated this 30th day of July, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing **PLAINTIFF'S MOTION FOR ENTRY OF JUDGMENT** was submitted electronically for filing and/or service with the Eighth Judicial District Court on the 30th day of July, 2018. Electronic service of the foregoing document shall be made in accordance with the E-Service List as follows:[9]

Andrea M. Champion	achampion@baileykennedy.com
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Attorneys for Defendant David E. Lujan

I further certify that I served a copy of this document by mailing a true and correct copy thereof, postage prepaid, addressed to:

N/A

/s/ Leah Dell
Leah Dell, an employee of
Marquis Aurbach Coffing

[9] Pursuant to EDCR 8.05(a), each party who submits an E-Filed document through the E-Filing System consents to electronic service in accordance with NRCP 5(b)(2)(D).

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EXHIBIT 4

EXHIBIT 4

OPPS
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Attorneys for Defendant
HARVEST MANAGEMENT SUB LLC

DISTRICT COURT

CLARK COUNTY, NEVADA

AARON M. MORGAN, individually,

Plaintiff,

vs.

DAVID E. LUJAN, individually; HARVEST MANAGEMENT SUB LLC; a Foreign-Limited-Liability Company; DOES 1 through 20; ROE BUSINESS ENTITIES 1 through 20, inclusive jointly and severally,

Defendants.

Case No. A-15-718679-C
Dept. No. XI

DEFENDANT HARVEST MANAGEMENT SUB LLC'S OPPOSITION TO PLAINTIFF'S MOTION FOR ENTRY OF JUDGMENT

Hearing Date: September 14, 2018
Hearing Time: In Chambers

Defendant Harvest Management Sub LLC ("Harvest"), hereby opposes the Motion for Entry of Judgment (the "Motion") filed by Plaintiff Aaron M. Morgan ("Mr. Morgan") on July 30, 2018.

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This Opposition is made and based on the following memorandum of points and authorities, the papers and pleadings on file, and any oral argument the Court may allow.[1]

DATED this 16th day of August, 2018.

BAILEY❖KENNEDY

By: */s/ Dennis L. Kennedy*
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SARAH E. HARMON
JOSHUA P. GILMORE
ANDREA M. CHAMPION

Attorneys for Defendants
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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

In the recent trial of this matter, Plaintiff Mr. Morgan wholly failed to pursue — and in fact appeared to have abandoned — the single claim (for negligent entrustment) that he asserted against Harvest, the former employer of the individual defendant, David E. Lujan ("Mr. Lujan"). In particular, Mr. Morgan failed to do any of the following at trial:

- He did not reference Harvest in his introductory remarks to the jury regarding the identity of the Parties and expected witnesses, (Ex. 10,[2] 17:2-24, 25:7-26:3);
- He did not mention Harvest or his claim against Harvest during jury voir dire, (*id.* at 33:2-93:22, 97:6-188:21, 191:7-268:12; Ex. 11,[3] at 3:24-65:7, 67:4-110:22);
- He did not reference Harvest or his claim against Harvest in his opening statement, (Ex. 11, at 126:7-145:17);
- He offered no evidence regarding any liability of Harvest for his damages;

---

[1] The Motion is currently scheduled to be heard in chambers by the Court on September 14, 2018. Harvest respectfully requests that, if the Court finds it appropriate, the Motion be set for hearing so that the parties can be heard on this important issue.

[2] Excerpts of Recorder's Tr. of Hrg. Civil Jury Trial (Apr. 2, 2018) are attached as Exhibit 10, at Vol. III of App. at H000384-H000619.

[3] Excerpts of Recorder's Tr. of Hrg. Civil Jury Trial (Apr. 3, 2018) are attached as Exhibit 11, at Vol. IV of App. at H000620-H000748.

- He did not elicit any testimony from any witness that could have supported his claim against Harvest;
- He did not reference Harvest or his claim against Harvest in his closing argument or rebuttal closing argument, (Ex. 12,[4] at 121:4-136:19, 157:13-161:10);
- He did not include his claim against Harvest in the jury instructions, (Ex. 13[5]); and
- He did not include Harvest in the Special Verdict Form, never asked the jury to assess liability against Harvest, and, in fact, gave the jury no option to find Harvest liable for anything, (Mot. at Ex. 1).

Now, having obtained a verdict in excess of $3 million (when interest is considered) against Mr. Lujan, and perhaps regretting his trial strategy, Mr. Morgan asks the Court to "fix" the jury's verdict and enter judgment against Harvest. Mr. Morgan attempts to classify the verdict form as merely an inadvertent clerical error that easily can be corrected by this Court. To the contrary, assessing liability against Harvest would require that this Court ignore the record and impose liability where none has been proven to exist, supplanting the jury's verdict with its own determination. Essentially, Mr. Morgan requests that the Court engage in reversible error by determining the ultimate liability of a party — rather than an issue of fact, as contemplated by Nevada Rule of Civil Procedure 49(a). Thus, Mr. Morgan's Motion must be denied.

Alarmingly, Mr. Morgan's Motion is based on multiple half-truths and blatant misrepresentations. For example, Mr. Morgan asserts — without a single citation to supporting evidence in the record (***because there is none***) — that (1) the issue of whether Mr. Lujan was acting within the course and scope of his employment at the time of the accident was "undisputed," (Mot. at 2:21-23); (2) the issue of vicarious liability was uncontested by Harvest, (*id.* at 4:21-22); and (3) "the record plainly supports" a judgment against both Mr. Lujan and Harvest, (*id.* at 6:7). The record, however, demonstrates the complete opposite.

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[4] Excerpts of Recorder's Tr. of Hrg. Civil Jury Trial (Apr. 9, 2018) are attached hereto as Exhibit 12, at Vol. IV of App. at H000749-H000774.

[5] A true and correct copy of the Jury Instructions (Apr. 9, 2018) are attached as Exhibit 13, at Vol. IV of App. at H000775-H000814.

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First, in his Complaint, Mr. Morgan pled a claim for negligent entrustment, not vicarious liability, and Harvest denied these allegations in its Answer. (Ex. 1,[6] at ¶¶ 15-22; Ex. 2,[7] at 2:8-9, 3:9-10.) Far from being undisputed or uncontested, ***Harvest squarely denied liability***. Thereafter, Mr. Morgan took no steps at trial to satisfy his burden of proof as to either negligent entrustment or vicarious liability. He developed no testimony and offered no evidence even suggesting that Mr. Lujan was acting within the course and scope of his employment with Harvest at the time of the accident. Nor did he develop any testimony or offer any evidence suggesting that Mr. Lujan was an inexperienced, incompetent, or reckless driver prior to the accident, or that Harvest knew or should have known of such (alleged) driving history. More importantly, Mr. Morgan failed to rebut the evidence offered by Mr. Lujan and Harvest which proved that Harvest could not be liable for either vicarious liability or negligent entrustment — specifically, Mr. Lujan's testimony that he was on a lunch break when the accident occurred and that he had never been in an accident before.

Given the lack of *any* evidence offered at trial against Harvest, there is no legal basis for entry of judgment against Harvest. Mr. Morgan's Motion — characterizing the verdict as a simple mistake — borders on dishonesty. Therefore, Harvest respectfully requests that Mr. Morgan's Motion be denied in its entirety and that a judgment be entered consistent with the jury's verdict — solely against Mr. Lujan.

II. RELEVANT FACTS AND PROCEDURAL HISTORY

A. The Pleadings.

On May 20, 2015, Mr. Morgan filed a Complaint against Mr. Lujan and Harvest. (*See generally* Ex. 1.) The only claim alleged against Harvest in the Complaint is captioned "Vicarious Liability/Respondeat Superior," but the allegations of the claim are more akin to a claim for ***negligent entrustment***. (*Id.* at ¶¶ 15-22 (alleging that Harvest negligently entrusted the vehicle to Mr. Lujan despite the fact that it knew or should have known that Mr. Lujan was an incompetent, inexperienced, or reckless driver).)

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[6] A true and correct copy of the Complaint (May 20, 2015) is attached as Exhibit 1, at Vol. I of App. at H000001-H000006.

[7] A true and correct copy of Defs.'Answer to Pl.'s Compl. (June 16, 2015) is attached as Exhibit 2, at Vol. I of App. at H000007-H000013.

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Despite the title of the claim, the third cause of action fails to allege that Mr. Lujan was acting within the course and scope of his employment at the time of the accident. (*Id*.) Rather, the only reference to "course and scope" in the entire Complaint is as follows:

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

(*Id.* at ¶ 9 (emphasis added).)

On June 16, 2015, Mr. Lujan and Harvest filed Defendants' Answer to Plaintiff's Complaint.[8] (*See generally* Ex. 2.) The Defendants denied Paragraph 9 of the Complaint, including its implied allegation that Mr. Lujan was acting within the course and scope of his employment at the time of the accident. (Ex. 1, at ¶ 9; Ex. 2, at 2:8-9.) Harvest admitted that it employed Mr. Lujan as a driver, that it owned the vehicle involved in the accident, and that it had entrusted control of the vehicle to Mr. Lujan. (Ex. 1, at ¶¶ 16-18; Ex. 2, at 3:7-8.) However, Harvest denied that: (i) Mr. Lujan was incompetent, inexperienced, or reckless in the operation of the vehicle; (ii) it knew or should have known that he was incompetent, inexperienced, or reckless in the operation of motor vehicles; (iii) Mr. Morgan was injured as a proximate consequence of Harvest's alleged negligent entrustment of the vehicle to Mr. Lujan; and (iv) Mr. Morgan suffered damages as a direct and proximate result of Harvest's alleged negligent entrustment of the vehicle to Mr. Lujan. (Ex. 1, at ¶¶ 19-22; Ex. 2, at 3:9-10.) Harvest's and Mr. Lujan's Answer also included an affirmative defense of comparative liability. (Ex. 2, at 3:16-21.)[9]

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[8] Mr. Morgan's Motion emphasizes that Mr. Lujan and Harvest were represented by the same counsel. (Mot. at 3:25-26.) This fact is irrelevant. Liability cannot be imputed to Harvest simply because it shared counsel with its employee. Mr. Morgan still bore the burden of proving his claims against both defendants.

[9] Harvest's and Mr. Lujan's Answer was admitted into evidence during the second trial, as Exhibit 26. (Excerpts of Recorder's Tr. of Hrg. Civil Jury Trial (Apr. 5, 2018), attached hereto as Exhibit 3, at Vol. I of App. at H000014-H000029, at 169:25-170:17.)

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B. Discovery.

On April 14, 2016, Mr. Morgan propounded interrogatories on Harvest.[10] (*See generally* Ex. 4.[11]) The interrogatories included a request regarding the background checks Harvest performed prior to hiring Mr. Lujan, (*id.* at 6:25-7:2), and a request regarding any disciplinary actions Harvest had taken against Mr. Lujan in the five years preceding the accident which related to Mr. Lujan's operation of a Harvest vehicle, (*id.* at 7:15-19). There were no interrogatories propounded upon Harvest which concerned whether Mr. Lujan was acting within the course and scope of his employment at the time of the accident. (*See generally* Ex. 4.)

On October 12, 2016, Harvest served its Responses to Mr. Morgan's Interrogatories. (*See generally* Ex. 5.[12]) Harvest answered Interrogatory No. 5, regarding the pre-hiring background checks relating to Mr. Lujan, as follows:

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

(*Id.* at 3:2-19 (emphasis added).) Further, in response to Interrogatory No. 8, regarding past disciplinary actions taken against Mr. Lujan, Harvest's response was "***None***." (*Id.* at 4:17-23 (emphasis added).)[13]

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[10] Mr. Morgan also propounded interrogatories on Mr. Lujan, but Mr. Lujan failed to serve any responses. Mr. Morgan never moved to compel Mr. Lujan to answer the interrogatories and never deposed Mr. Lujan.

[11] A true and correct copy of Pl.'s First Set of Interrogs. to Def. Harvest Mgmt. Sub LLC (Apr. 14, 2016) is attached as Exhibit 4, at Vol. 1 of App. at H000030-H000038.

[12] A true and correct copy of Def. Harvest Mgmt. Sub, LLC's Resps. to Pl.'s First Set of Interrogs. (Oct. 12, 2016) is attached as Exhibit 5, at Vol. I of App. at H000039-H000046.

[13] Portions of Harvest's Responses to Mr. Morgan's Interrogatories were read to the jury during the second trial, (Excerpts of Recorder's Tr. of Hrg. Civil Jury Trial (Apr. 6, 2018), attached hereto as Exhibit 6, at Vol. I of App. at H000047-H000068, at 10:22-13:12).

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

C. The First Trial.

This case was first tried to a jury on November 6, 2017 through November 8, 2017. (*See generally* Ex. 7[14]; Ex. 8.[15]) At the start of the first trial, when the Court asked the prospective jurors if they knew any of the Parties or their counsel, the Court asked about Mr. Morgan, Plaintiff's counsel, Mr. Lujan, and defense counsel. (Ex. 7, at 36:24-37:25.) No mention was made of Harvest, and no objection was raised by Mr. Morgan. (*Id.*) Further, when the Court asked counsel to name their witnesses to determine if the prospective jurors were familiar with any witnesses, no officer, director, employee, or other representative of Harvest was named as a potential witness. (*Id.* at 41:1-21.)

Mr. Morgan also never referenced Harvest, his express claim for negligent entrustment, or his attempted claim for vicarious liability during voir dire or his opening statement. (*Id.* at 45:25-121:20, 124:13-316:24; Ex. 9,[16] at 6:4-29:1.) In fact, Harvest was not mentioned until the third day of the first trial, while Mr. Lujan was on the witness stand. Mr. Lujan's relevant testimony is as follows:

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

(Ex. 8, at 108:23-109:8.)

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[14] Excerpts of Tr. of Jury Trial (Nov. 6, 2017) are attached as Exhibit 7, at Vol. II of App. at H000069-H000344.

[15] Excerpts of Tr. of Jury Trial (Nov. 8, 2017) are attached as Exhibit 8, at Vol. III of App. at H000345-H000357.

[16] Excerpts of Tr. of Jury Trial (Nov. 7, 2017) are attached as Exhibit 9, at Vol. III of App. at H000358-H000383.

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Mr. Lujan also provided the only evidence during trial which was relevant to claims of either negligent entrustment or vicarious liability:

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

(*Id.* at 111:16-24 (emphasis added).)

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

(*Id.* at 112:8-10 (emphasis added).)

After counsel for Mr. Morgan completed his examination of Mr. Lujan, the court permitted the jury to submit its own questions. A juror — not Mr. Morgan — asked Mr. Lujan:

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

(*Id.* at 131:21-24, 132:18, 132:22-133:2 (emphasis added).)

Later that day, the first trial ended prematurely as a result of a mistrial, when defense counsel inquired about a pending DUI charge against Mr. Morgan. (*Id.* at 150:15-152:14, 166:12-18.)

D. <u>The Second Trial.</u>

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

The second trial of this action commenced on April 2, 2018. (*See generally* Ex. 10.) The second trial was very similar to the first trial regarding the lack of reference to and the lack of evidence offered regarding Harvest. First, Harvest was not officially identified as a party when the court requested that counsel identify themselves and the Parties for the jury. In fact, counsel for the defense merely stated as follows:

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> MR. GARDNER: Hello everyone. What a way to start a Monday, right? In my firm we've got myself, Doug Gardner and then Brett South, who is not here, but this is Doug Rands, and then my client, Erica[17] is right back here. Let's see, I think that's it for me.

(*Id.* at 17:15-18.) Mr. Morgan did not object or inform the prospective jurors that the case also involved Harvest, or a corporate defendant, or even the employer of Mr. Lujan. (*Id.* at 17:19-24.)

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

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

(*Id.* at 25:6-14 (emphasis added).) Again, consistent with his approach in the first trial and throughout the remainder of this second trial, Mr. Morgan did not object or clarify that the case also involved a claim against Mr. Lujan's employer, Harvest. (*Id.* at 25:15-22.)

Finally, when the Court asked the Parties to identify the witnesses they planned to call during trial, no mention was made of any officer, director, employee, or other representative of Harvest — not even the representative, Erica Janssen, who was attending trial. (*Id.* at 25:15-26:3.)

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

Just as with the first trial, Mr. Morgan failed to reference Harvest or his claim for negligent entrustment/vicarious liability during voir dire. (*Id.* at 33:2-93:22, 97:6-188:21, 191:7-268:12; Ex. 11, at 3:24-65:7, 67:4-110:22.) Moreover, during Mr. Morgan's opening statement, Plaintiff's counsel never made a single reference to Harvest, a corporate defendant, vicarious liability,

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[17] In the second trial, Mr. Lujan chose not to attend. Mr. Gardner's introduction referenced Erica Janssen, a representative of Harvest.

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negligent entrustment, or even the fact that there were two defendants in the action. (Ex. 11, at 126:7-145:17.) Plaintiff's counsel merely stated:

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

(*Id.* at 126:15-25.) Plaintiff's counsel made no reference to any evidence to be presented during the trial which would demonstrate that Mr. Lujan was acting in the course and scope of his employment at the time of the accident or that Harvest negligently entrusted the vehicle to Mr. Lujan. (*Id.* at 126:7-145:17.)

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

On the fourth day of the second trial, Mr. Morgan called Erica Janssen, the Rule 30(b)(6) representative of Harvest, as a witness during his case in chief. (Ex. 3, at 164:13-23.) Ms. Janssen confirmed that it was Harvest's understanding that Mr. Lujan had been at a park in a shuttlebus having lunch and that the accident occurred as he exited the park:

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

(*Id.* at 168:15-23 (emphasis added).)

Mr. Morgan never asked Ms. Janssen where she was employed, her title, whether Harvest employed Mr. Lujan, what Mr. Lujan's duties were, or any other questions that might have elicited evidence to support a claim for negligent entrustment or vicarious liability. (*Id.* at 164:21-177:17;

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Ex. 6, at 4:2-6:1.) In fact, it wasn't until redirect examination that Mr. Morgan even referenced the fact that Ms. Janssen was in risk management for Harvest:

> [MR. CLOWARD:]
> Q: So where it says, on interrogatory number 14, and you can follow along with me:
>
> > "Please provide the full name of the person answering the interrogatories on behalf of the Defendant, Harvest Management Sub, LLC, and state in what capacity your [*sic*] are authorized to respond on behalf of said Defendant.
> > "A. Erica Janssen, Holiday Retirement, Risk Management."
>
> A: Yes.

(Ex. 6, at 11:18-25.) Other than this acknowledgement that Ms. Janssen executed interrogatory responses on behalf of Harvest, Mr. Morgan, again, failed to elicit any evidence on redirect examination to support a claim for negligent entrustment or vicarious liability. (*Id.* at 9:23-12:6, 13:16-15:6.)

On the fifth day of the second trial, Mr. Morgan rested his case (*id.* at 55:6-7), again, with no evidence presented to support a claim for vicarious liability or negligent entrustment — i.e., evidence of Mr. Lujan's driving history; Harvest's knowledge of Mr. Lujan's driving history; disciplinary actions Harvest took against Mr. Lujan prior to the accident; background checks Harvest performed on Mr. Lujan; alcohol and drug testing Harvest performed on Mr. Lujan; Mr. Lujan's job duties; Harvest's policy regarding the use of company vehicles to drive to and from lunch; whether Mr. Lujan was required to clock-in and clock-out during his shifts; or whether any residents of the retirement home were passengers on the bus at the time of the accident, among other facts.[18]

During the defense's case in chief — not Mr. Morgan's — defense counsel read portions of Mr. Lujan's testimony from the first trial into the record. (*Id.* at 195:7-203:12.) As referenced above, this testimony included that: (1) Mr. Lujan worked as a bus driver for Montara Meadows at the time of the accident; (2) Harvest was the "corporate office" for Montara Meadows; (3) the

[18] It should be noted that despite the lack of evidence on these issues, Plaintiff's counsel stated, during his closing argument, that there were no passengers on the bus at the time of the accident. (Ex. 12, at 124:15-17) ("That this company transporting our elderly members of the community is going to follow the rules of the road. ***Aren't we lucky that there weren't other people on the bus?*** Aren't we lucky?") (emphasis added)).

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accident occurred when Mr. Lujan was leaving Paradise Park; and (4) Mr. Lujan had never been in an "accident like that" or an accident in a bus before. (*Id.* at 195:8-17, 195:25-196:10, 196:19-24, 197:8-10.)

This testimony, coupled with Ms. Janssen's testimony that Mr. Lujan was on his lunch break at the time of the accident, is the complete universe of evidence offered at the second trial that even tangentially concerns Harvest.

4. There Are No Jury Instructions Pertaining to the Claim Against Harvest.

As Mr. Morgan points out in his Motion, the jury instructions provided to the jury included the correct caption for this action and listed both Mr. Lujan and Harvest as defendants. (Ex. 13, at 1:6-12.) However, Mr. Morgan fails to disclose in his Motion that neither party submitted any jury instructions ***pertaining to vicarious liability, actions within the course and scope of employment, negligent entrustment, or corporate liability***. (*See generally* Ex. 13.)

Again, this is entirely consistent with Mr. Morgan's trial strategy. He all but ignored Harvest throughout the trial process.

5. Mr. Morgan Failed to Include Harvest in the Special Verdict Form.

On the last day of trial, before commencing testimony for that day, the Court provided the Parties with a sample jury form that the Court had used in its last car accident trial.

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

(Ex. 12, at 5:20-6:1 (emphasis added).) Later that same day, after the defense rested its case, Plaintiff's counsel informed the Court that it only wanted to make one change to the special verdict form that the Court had proposed:

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

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

(*Id.* at 116:11-23 (emphasis added).) The Special Verdict Form approved by Mr. Morgan — after his edits were accepted and incorporated by the Court — makes no mention of Harvest (which is entirely consistent with Mr. Morgan's trial strategy).

Mr. Morgan asserts that the Special Verdict form simply "inadvertently omitted Harvest Management from the caption." (Mot. at 2:24-25.) This is disingenuous. Not only does the caption list Mr. Lujan as the sole defendant, (*id.* at Ex. 1, at 1:6-12), but:

- The Special Verdict form only asked the jury to determine whether the "***Defendant***" was negligent, (*id.* at 1:17 (emphasis added));
- The Special Verdict form did not ask the jury to find Harvest liable for anything, (*id.*);
- The Special Verdict form directed the jury to apportion fault only between "***Defendant***" and Plaintiff, with the percentage of fault totaling 100 percent, (*id.* at 2:1-4 (emphasis added)); and
- Mr. Morgan never objected to the failure to apportion fault between Plaintiff and the ***two*** defendants, as is required by NRS 41.141, (*id.*).

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

Finally, in closing arguments, Plaintiff's counsel never even mentioned Harvest or Mr. Morgan's claim for negligent entrustment or vicarious liability. (Ex. 12, at 121:5-136:19.) Plaintiff's counsel merely made references to the testimony of Erica Janssen and the fact that she: (1) contested liability; (2) blamed Mr. Morgan for the accident; (3) blamed an unknown third party for the accident; and (4) was unaware that Mr. Lujan had previously testified that Mr. Morgan had done nothing wrong and was not to blame for the accident. (*Id.* at 122:10-123:5.)

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Further, and perhaps the clearest example of the impropriety of Mr. Morgan's Motion, Plaintiff's counsel ***explained to the jury, in closing, how to fill out the Special Verdict form***. His remarks on liability were ***limited exclusively to Mr. Lujan***:

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

(Id. at 124:20-125:6 (emphasis added).) Plaintiff's counsel also failed to mention Harvest or the claim alleged against Harvest in his rebuttal closing argument. (*Id.* at 157:13-161:10.)

III. LEGAL ARGUMENT

A. A Judgment Cannot Be Entered Against Harvest Because It Would Be Contrary to the Pleadings, Evidence, and Jury Instructions in This Case.

Mr. Morgan's primary argument in bringing this Motion is that the Court should enter judgment against Harvest "because such a result conforms to the pleadings, evidence, and jury instructions upon which the jury relied in reaching the special verdict." (Mot. at 5:14-17; *see also Id.* at 2:23-24, 6:7.) However, Mr. Morgan fails to cite to a single piece of evidence or even a jury instruction that would demonstrate that the jury intended to find Harvest liable for the claim alleged in the Complaint. Rather, Mr. Morgan makes unsupported assertions that the claim of vicarious liability was not contested at trial, (*id.* at 4:21-22), and that it was undisputed that Mr. Lujan was acting within the course and scope of his employment with Harvest at the time of the accident, (*id.* at 2:21-23).

The record establishes that Mr. Morgan failed to meet his burden of proof as to any claim he alleged (or attempted to allege) against Harvest. The record further establishes that Harvest cannot be liable for vicarious liability or negligent entrustment, as a matter of law, because Mr. Lujan was at

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lunch when the accident occurred and he has no prior history of reckless or negligent driving. Finally, the record establishes that Mr. Morgan — whether through carelessness, a strategic trial decision, or acceptance of the futility of his claim — completely ignored Harvest and Harvest's alleged liability at trial and chose to focus solely on Mr. Lujan's liability and the amount of his damages. Thus, there is no factual basis for entry of judgment against Harvest.

1. Mr. Morgan Failed to Prove That Harvest Was Vicariously Liable for Mr. Lujan Injuries or Liable for Negligent Entrustment.

Mr. Morgan asserts that the issue of vicarious liability was not contested. (Mot. at 4:21-22.) This is not true. Harvest contested liability for the only claim pled in the Complaint — negligent entrustment — and for the attempted claim of vicarious liability, by denying these allegations in its Answer. (Ex. 1, at ¶¶ 9, 19-22; Ex. 2, at 2:8-9, 3:9-10.) Thus, as the plaintiff, Mr. Morgan bore the burden of proving his claims against Harvest at trial. *Porter v. Sw. Christian Coll.*, 428 S.W.3d 377, 381 (Tex. App. 2014) ("A plaintiff pleading respondeat superior bears the burden of establishing that the employee acted within the course and scope of his employment."); *Montague v. AMN Healthcare, Inc.*, 168 Cal. Reptr. 3d 123, 126 (Cal. Ct. App. 2014) ("The plaintiff bears the burden of proving that the employee's tortious act was committed within the scope of his or her employment."); *Willis v. Manning*, 850 So. 2d 983, 987 (La. Ct. App. 2003) (recognizing that the plaintiff bears the burden of proof on a claim for negligent entrustment); *Dukes v. McGimsey*, 500 S.W.2d 448, 451 (Tenn. Ct. App. 1973) ("The plaintiff has the burden of proving negligent entrustment of an automobile.")

Not only did Mr. Morgan fail to prove his claim, but the evidence adduced at trial actually demonstrated that Harvest could not be liable for either vicarious liability or negligent entrustment. Specifically, the undisputed evidence offered at trial proved that Mr. Lujan was at lunch at the time of the accident and had never been in an accident before. (Ex. 3, at 168:15-23; Ex. 6, at 196:19-24, 197:8-10.) Such evidence prevents the imposition of a judgment against Harvest.

J&C Drilling Co. v. Salaiz, 866 S.W.2d 632 (Tex. App. 1993), is instructive on this issue:

> We reject appellees' contention that the issue of course and scope was not contested. Appellants' answer contained a general denial, which put in issue all of the allegations of

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> appellees' petition, including the allegation that Gonzalez was acting in the course and scope of his employment with J&C. Because appellees had the burden of proof on this issue, it was not necessary for appellants to present evidence negating course and scope in order to contest the issue. In any event, as is discussed below, evidence was presented that Gonzalez was on a personal errand at the time of the accident, refuting the allegation that he was acting in the course and scope of his employment.

(*Id.* at 635).

a. Mr. Morgan Did Not Prove a Claim for Vicarious Liability, and Based on the Sole Evidence Offered at Trial Which Relates to This Claim, No Judgment Can Be Entered Against Harvest.

While Mr. Morgan's Complaint states one claim for relief against Harvest entitled "Vicarious Liability/Respondeat Superior," the allegations contained therein do not actually reflect a theory of respondeat superior — i.e., that Mr. Lujan was acting within the course and scope of his employment with Harvest at the time of the accident. (*See* Ex. 1 at ¶¶ 15-22.) Rather, his claim was akin to a claim for negligent entrustment, alleging that: (1) Mr. Lujan was employed as a driver for Harvest; (2) Harvest entrusted him with the vehicle; (3) Mr. Lujan was an incompetent, inexperienced, and/or reckless driver; and (4) Harvest actually knew, or should have known, of Mr. Lujan's inexperience or incompetence. (*See id.*)

It is anticipated that Mr. Morgan will argue that one general allegation in his Complaint which references the course and scope of employment was sufficient to state a claim for respondeat superior. (*Id.* at ¶ 9.) Even assuming *arguendo* that Mr. Morgan alleged a claim for vicarious liability, he failed to prove this claim at trial. Vicarious liability and/or respondeat superior applies to an employer only 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, 1225-26, 925 P.2d 1175, 1179, 1180-81 (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 the very task assigned to him'") (quoting *Prell Hotel Corp. v. Antonacci*, 86 Nev. 390, 391, 469 P.2d 399, 400 (1970)).

Mr. Morgan failed to offer any evidence as to Mr. Lujan's status at the time of the accident. The *only* facts adduced at trial that are related to Mr. Lujan's employment were: (1) that Mr. Lujan

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was an employee of Montara Meadows (a bus driver); (2) that Mr. Lujan drove the bus to Paradise Park for a lunch break; (3) that the accident occurred as Mr. Lujan was exiting the park; and (3) that Harvest is the "corporate office" of Montara Meadows. (*See* Ex. 3, at 168:15-23; Ex. 6, at 195:8-17, 195:25-196:10.)

Mr. Morgan failed to establish whether Mr. Lujan was "on the clock" during his lunch break, whether Mr. Lujan had returned to work and was transporting passengers at the time of the accident, whether Mr. Lujan had to "clock in" after his lunch break, whether Mr. Lujan was permitted to use a company vehicle while on his lunch break, or whether Harvest Management even knew that Mr. Lujan was using a company vehicle during his lunch breaks. Without developing these facts, there is insufficient evidence, under Nevada law, to conclude that Mr. Lujan was acting in the course and scope of his employment at the time of the accident.

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Moreover, the evidence offered by Mr. Lujan and Harvest demonstrates that Harvest is not vicariously liable for Mr. Morgan's injuries. Nevada has adopted the "going and coming rule." Under this rule, "[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." *Molino v. Asher*, 96 Nev. 814, 817-18, 618 P.2d 878, 879-80 (1980); *see also Nat'l Convenience Stores, Inc. v. Fantauzzi*, 94 Nev. 655, 658, 584 P.2d 689, 691 (1978). The rule is premised upon the idea that the "'employment relationship is "suspended" from the time the employee leaves until he returns, or that in commuting, he is not rendering service to his employer.'" *Tryer v. Ojai Valley Sch.*, 12 Cal. Rptr. 2d 114, 116 (Cal. Ct. App. 1992) (quoting *Hinman v. Westinghouse Elec. Co.*, 471 P.2d 988, 990-91 (Cal. 1970)).

While the Nevada Supreme Court has not specifically addressed whether an employer is vicariously liable for an employee's actions during a lunch break, the express language of and policy behind the "going and coming rule" suggests that an employee is not acting within the course and scope of his employment when he commutes to and from lunch during a break from his employment. Moreover, other jurisdictions have routinely determined that employers ***are not liable for an employee's negligence during a lunch break***. *See e.g., Gant v. Dumas Glass & Mirror, Inc.*, 935 S.W. 2d 202, 212 (Tex. App. 1996) (holding that an employer was not liable under respondeat

superior when its employee rear-ended the plaintiff while driving back from his lunch break in a company vehicle because the test is not whether the employee is returning from his personal undertaking to "***possibly*** engage in work" but rather whether the employee ***has*** "returned to the zone of his employment" and engaged in the employer's business); *Richardson v. Glass*, 835 P.2d 835, 838 (N.M. 1992) (finding the employer was not vicariously liable for the employee's accident during his lunch break because there was no evidence of the employer's control over the employee at the time of the accident); *Gordon v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 411 So. 2d 1094, 1098 (La. Ct. App. 1982) ("Ordinarily, an employee who leaves his employer's premises and takes his noon hour meal at home or some other place of his own choosing is outside the course of his employment from the time he leaves the work premises until he returns.").

Because Mr. Morgan failed to offer any evidence proving that Mr. Lujan was acting within the course and scope of his employment at the time of the accident — and the only evidence regarding Mr. Lujan's actions at the time of the accident demonstrate that he was on a lunch break — as a matter of law, judgment cannot be entered against Harvest on a claim of vicarious liability.

b. Mr. Morgan Also Failed to Prove to the Jury That Harvest Is Liable for Negligent Entrustment.

While Mr. Morgan does not address the claim of negligent entrustment in his Motion, it bears noting that he likewise failed to prove that Harvest was liable for the ***sole claim actually alleged against it in the Complaint***. In Nevada, "a person who knowingly entrusts a vehicle to an inexperienced or incompetent person" may be found liable for damages resulting therefrom. *Zugel by Zugel v. Miller*, 100 Nev. 525, 527, 688 P.2d 310, 312 (1984). To establish negligent entrustment, a plaintiff must demonstrate: (1) that an entrustment actually occurred; and (2) that the entrustment was negligent. *Id*. at 528, 688 P.2d at 313.

It is true that Harvest conceded that Mr. Lujan was its employee and that it entrusted him with a vehicle — satisfying the first element of a negligent entrustment claim; however, the second element was contested and never proven to a jury. (Ex. 2, at 3:9-10.) Mr. Morgan offered no evidence of Harvest's negligence in entrusting Mr. Lujan with a company vehicle. He adduced no evidence that Mr. Lujan was an inexperienced or incompetent driver. In fact, the only evidence in

the record relating to Mr. Lujan's driving history demonstrates that he has never been in an accident before. (*See* Ex. 6, at 196:19-24; 197:8-10).

Mr. Morgan also failed to offer any evidence regarding Harvest's knowledge of Mr. Lujan's driving history. This is likely because Harvest's interrogatory responses demonstrated early in the case that it thoroughly checked Mr. Lujan's background prior to hiring him, and Harvest's annual check of Mr. Lujan's motor vehicle record "always came back clear." (Ex. 5, at 3:2-19.)

Because Mr. Morgan failed to offer any evidence at trial that Mr. Morgan was an inexperienced or incompetent driver and that Harvest knew or should have known of his inexperience or incompetence, the record fails to support entry of a judgment against Harvest for negligent entrustment. In fact, the undisputed evidence offered by Mr. Lujan demonstrating that he has never been in an accident before precludes entry of judgment against Harvest for negligent entrustment.

2. The Record Belies Mr. Morgan's Contention That He Proceeded to Verdict Against Harvest.

Further undermining his current position, the record conclusively establishes that Mr. Morgan made a conscious choice and/or strategic decision to abandon his claim against Harvest at trial. Mr. Morgan never mentioned Harvest during the introductory remarks to the jury in which the Parties and expected witnesses were introduced to the jury. (Ex. 10, at 17:2-24, 25:7-26:3.) Mr. Morgan never mentioned Harvest to the jury during voir dire or examined prospective jurors about their feelings regarding corporate liability, negligent entrustment, or vicarious liability. (*Id*. at 33:2-93:22, 97:6-188:21, 191:7-268:12; Ex. 11, at 3:24-65:7, 67:4-110:22.) Mr. Morgan never mentioned Harvest, vicarious liability, negligent entrustment, or even corporate liability in his opening statement. (Ex. 11, at 126:7-145:17.) Mr. Morgan never offered a single piece of evidence or elicited any testimony from any witness which would prove the elements of either vicarious liability or negligent entrustment. Mr. Morgan never mentioned Harvest, vicarious liability, negligent entrustment, or corporate liability in his closing argument or rebuttal closing argument. (Ex. 12, at 121:4-136:19, 157:13-161:10.) Mr. Morgan failed to include questions relating to Harvest's liability or the apportionment of fault to Harvest in the Special Verdict form, despite requesting revisions to

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the damages question in the sample Special Verdict form proposed by the Court.[19] (Ex. 12, at 116:11-23; *see also* Mot. at Ex. 1.) Finally, Mr. Morgan failed to include a single jury instruction relating to vicarious liability, negligent entrustment, or corporate liability. (Ex. 13.)

For Mr. Morgan to claim that the omission of Harvest from the Special Verdict form was a mere oversight or clerical error to be corrected by the Court is completely disingenuous. Mr. Morgan employed the same strategy for litigating his claims in the first trial — he chose to focus solely on Mr. Lujan's liability for negligence. Harvest was not mentioned in the introductory remarks to the jurors, in voir dire, in opening statements, or in the examination of any witness. (Ex. 7, at 29:4-17, 36:24-37:25, 41:1-21, 45:25-121:20, 124:13-316:24; Ex. 9, at 6:4-29:1.) Thus, the record clearly demonstrates that Mr. Morgan abandoned his claim against Harvest — likely due to a lack of evidence.

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B. Mr. Morgan's Alternative Request That Judgment Be Entered Against Harvest Pursuant to N.R.C.P. 49(a) Is Contrary to the Law and Must Be Denied.

In the alternative, Mr. Morgan asks this Court to make an explicit finding, under Nevada Rule of Civil Procedure 49(a), that Harvest is jointly and severally liable for the jury's verdict against Mr. Lujan. (*See* Mot. at 5:18-6:11.) N.R.C.P. 49(a) permits a court to submit a special verdict form, or special interrogatories, to the jury. If a special verdict form is submitted to the jury and a particular "issue of fact raised by the pleadings or by the evidence" is omitted from the special verdict form, "each party waives the right to a trial by jury of the issue omitted unless, before the jury retires[,] the party demands its written submission to the jury." N.R.C.P. 49(a). If there are any omitted issues for which a demand was not made by a party, "the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict." *Id.* Thus, the Court is permitted to make findings on omitted ***factual issues*** in order to avoid "the hazard of the verdict remaining incomplete and indecisive where the jury did not decide

[19] Mr. Morgan attempts to shift the blame to the Court for the Special Verdict form's omission of Harvest. (Mot. at 5:1-8.) While the Court did provide the Parties with a sample special verdict form that it had used in its most recent car accident case (completely unrelated to this action), the Court clearly expected counsel to apply the correct caption and make any other changes they wanted. (Ex. 12, at 5:20-6:1.) It is Mr. Morgan — not the Court — that is responsible for a special verdict form that pertains solely to Mr. Lujan.

every element of recovery or defense." 33 Fed. Proc., L. Ed. § 44:326, Omitted Issue—Substitute Finding By Court (June 2018).[20] However, N.R.C.P 49(a) does not permit the Court to decide the ultimate issue of liability or to enter judgment where there is a complete lack of evidence to support a judgment.

This Court need not look any further than *Kinnel v. Mid-Atlantic Mausoleums, Inc*., 850 F.2d 958 (3rd Cir. 1988), to determine that Mr. Morgan's request is beyond the power of this Court and completely contrary to clearly established case law. In *Kinnel*, the plaintiff brought claims against two defendants — a corporate entity (Mid-Atlantic Mausoleum, Inc.) and an individual (Kennan) — on the same claims for relief. *Id.* at 959. The court bifurcated the trial as to liability and damages. *Id*. During the trial on liability, the court submitted written interrogatories to the jury. *Id.* However, the written interrogatories failed to include any questions regarding Kennan's individual liability. *Id*. Thus, when the jury returned its verdict, it only found liability as to Mid-Atlantic Mausoleum. *Id*. Nonetheless, the district court entered judgment against both defendants in its order and the jury later determined damages against both defendants. *Id*. at 959-60.

On appeal, the Third Circuit reversed, finding that the district court erred in entering judgment against Kennan *even though the claims against the defendants were indistinguishable and the jury subsequently determined damages against both defendants*. *Id*. at 960. In reversing the trial court's entry of liability against Kennan, the Third Circuit drew a distinction between a court supplying an omitted subsidiary finding (as intended by the rule) and a court supplanting the jury to determine the ultimate liability of a party (which was never intended by the rule):

> Rule 49(a) as we understand it, was designed to have the court supply an omitted subsidiary finding which would complete the jury's determination or verdict. For example, although we recognize that in this case no individual elements of a misrepresentation cause of action were specifically framed for the jury to answer, nevertheless, the district court could 'fill in' those subsidiary elements when the jury returned a verdict finding that Mid-Atlantic had misrepresented commission rates to Kinnel. Subsumed within that ultimate jury findings were the five elements of misrepresentation, i.e., materiality,

[20] As the Nevada Rules of Civil Procedure are closely based on the Federal Rules of Civil Procedure, Nevada courts consider federal cases interpreting the rules as strong persuasive authority. *Exec. Mgmt., Ltd. v. Ticor Title Ins. Co.*, 118 Nev. 46, 53, 38 P.2d 872, 876 (2002); *Las Vegas Novelty, Inc. v. Fernandez*, 106 Nev. 113, 119, 787 P.2d 772, 776 (1990).

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> deception, intent, reasonable reliance and damages, each of which could be deemed to have been supplied by the court in accordance with the jury's judgment once the jury's ultimate verdict was known.
>
> ***That procedure of supplying a finding subsidiary to the ultimate verdict is a far cry, however, from a procedure whereby the court in the absence of a jury verdict, determines the ultimate liability of a party, as it did here. We have been directed to no authority which would permit the district court to act as it did here in depriving Kennan of his right to a jury verdict***.

Id. at 965-66 (emphasis added). In refusing to make a finding as to the ultimate liability to the individual defendant, the Court declined to "'***enter the minds of the jurors to answer a question that was never posed to them . . .***'" *Id*. at 967 (emphasis added) (quoting *Stradley v. Cortez*, 518 F.2d 488, 490 (3rd Cir. 1975)).[21]

Despite the fact that Rule 49(a) only applies to factual findings, and ultimate liability cannot be entered by a court under Rule 49(a),[22] Mr. Morgan now invites reversible error by asking this

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[21] *Stradley* addressed a somewhat similar issue of an "omitted verdict." In *Stradley*, the complaint named two individual defendants, Frederick Cortez, Sr. and Frederick Cortez, Jr. 518 F.2d at 489. When the deputy clerk asked the jury foreman about the verdict, the clerk only inquired if the jury found the *defendant* liable, and the clerk announced that the jury had found *Cortez, Jr*. liable for the plaintiff's injuries. *Id*. at 489-90. The jury foreman confirmed this verdict. *Id*. at 490. Four years after the judgment was entered, the plaintiff moved to change the docket and enter judgment against both defendants, claiming that the deputy clerk's examination of the jury foreman was the only reason the judgment was not entered against both defendants. *Id*. The district court denied the plaintiff's motion, refusing to treat the judgment as a "clerical error." *Id.* The Third Circuit upheld that decision. *Id.* The Court held:

> We believe that the jury/clerk colloquy, the verdict, and the entry of judgment set out in Stradley's motion, if anything, supports the defendant's position rather than Stradley's. We cannot at this late stage overturn what appears to be ***a verdict consistent with the evidence presented*** on plaintiff's ***mere allegation that the jury intended to do other than it did*** when it returned a verdict solely against Cortez, Jr. Stradley's claim that the jury never exonerated Senior and never indicated that its findings of liability should relate only to Junior are not borne out by the verdict, the judgment, or the record at trial.
>
> We have ***reviewed the record*** of the 1970 trial and have found ***no evidence that, at the time of the accident, Cortez, Jr. was acting as the agent of or under the control of his father***. While the defendants were not present or represented at trial, ***their answer, specifically denying agency***, was still of record. ***It was incumbent upon plaintiff to offer some evidence to prove the alleged agency relationship***.

Id. at 495 (emphasis added).

[22] *See Williams v. Nat'l R.R. Passenger Corp.*, No. 90-5394, 1992 WL 230148 (E.D. Penn. Sept. 8, 1992) (refusing to determine individual recovery by each plaintiff, under Rule 49(a), because the three plaintiffs were treated jointly, and interchangeably, as the "plaintiff" throughout the case); *Jarvis v. Ford Motor Co*., 283 F.3d 33, 56 (2002) (holding that Rule 49(a) does not apply where "the jury is required to make determinations not only of issues of fact but of ultimate liability").

Court to do exactly what *Kinnel* held it cannot: to enter judgment against Harvest. The jury never rendered such a verdict and the record fails to support entry of such a verdict.

C. Mr. Morgan's Failure to Request Apportionment of Damages Between the Defendants Dooms His Current Request that Judgment Be Entered Against Harvest.

Finally, even assuming *arguendo* Mr. Morgan had proved a claim of negligent entrustment or vicarious liability against Harvest (which he did not), and the Court had the power to add Harvest to the jury's verdict under Rule 49(a) (which it does not), it still would be impossible to enter judgment against Harvest in this case because Mr. Morgan failed to have the jury determine how to apportion liability between the defendants. Specifically, Mr. Morgan asks this Court to find that Harvest is jointly and severally liable for Mr. Lujan's conduct, (*see* Mot. at 6:7-11), despite the fact that Nevada abolished joint and several liability in cases against multiple, negligent tortfeasors over thirty years ago. *See Warmbrodt v. Blanchard*, 100 Nev. 703, 707-08, 692 P.2d 1282, 1285-86 (1984) (explaining that NRS 41.141 "eliminat[ed]" and "abolished" two common-law doctrines: (1) a plaintiff's contributory negligence as a complete bar to recovery; and (2) joint and several liability against negligent defendants), *superseded by statute on other grounds as stated in Countrywide Home Loans v. Thitchener*, 124 Nev. 725, 740-43 & n.39, 192 P.3d 243, 253-55 & n.39 (2008).

The law requires that "[i]n any action to recover damages for death or injury . . . in which comparative negligence is asserted as a defense [and] the jury determines the plaintiff is entitled to recover [damages], [the jury] shall return . . . [a] special verdict indicating the percentage of negligence attributable to each party remaining in the action."[23] NRS 41.141(1), (2)(b)(2). If a plaintiff is entitled to recover against more than one defendant, then "***each defendant is severally liable to the plaintiff only for that portion of the judgment which represents the percentage of negligence attributable to that defendant***."[24] NRS 41.141(4) (emphasis added). By way of

[23] The jury does not need to find that the plaintiff was comparatively negligent to trigger the application of NRS 41.141; it is enough that a comparative negligence defense is asserted. *See Piroozi v. Eighth Jud. Dist. Ct. ex rel. Cnty. of Clark*, 131 Nev. Adv. Op. 100, 363 P.3d 1168, 1171 (2015). In this case, Mr. Lujan and Harvest collectively asserted a comparative negligence defense. (Ex. 2, at 3:16-21.)

[24] "[B]y abandoning joint and several liability against negligent defendants, the Legislature sought to ensure that a negligent defendant's liability would be limited to an amount proportionate with his or her fault." *Café Moda, LLC v. Palma*, 128 Nev. 78, 82, 272 P.3d 137, 140 (2012) (citing 1973 Nev. Stat., ch. 787, at 1722; Hearing on S.B. 524 Before the Senate Judiciary Comm., 57th Leg. (Nev. April 6, 1973)).

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example, if a jury determines that Defendant A is 80 percent negligent and Defendant B is 20 percent negligent, then Defendant B is only liable for 20 percent of the judgment awarded to the plaintiff. *See Café Moda, LLC v. Palma*, 128 Nev. 78, 84, 272 P.3d 137, 141 (2012).

Here, Harvest and Mr. Lujan jointly asserted an affirmative defense of comparative negligence. (Ex. 2, at 3:16-21.) Despite the fact that Mr. Morgan had alleged negligence-based claims against two defendants, he failed to ask the jury to apportion damages between Mr. Lujan and Harvest as required by NRS 41.141. (*See generally* Mot. at Ex. 1.) Mr. Morgan has not (and cannot) cite to any authority that allows the Court to now determine how to apportion liability between the defendants (assuming there was a factual basis for entry of judgment against Harvest). Indeed, it would be completely contrary to N.R.C.P. 49(a) and *Kinnel* for the Court to find that any portion of the jury's $3 million verdict could be applied to Harvest because that would be a determination of ultimate liability —not a factual finding.

IV. CONCLUSION[25]

Now, dissatisfied with his trial strategy, Mr. Morgan asks this Court to do what it cannot: to enter liability against Harvest despite the complete lack of evidence to prove his claim for either vicarious liability or negligent entrustment. Mr. Morgan's request is not only contrary to the record

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[25] Given the brevity of Mr. Morgan's Motion, his lack of citations to the record, and his failure to truly analyze the evidence and procedure of this case, Harvest is concerned that Mr. Morgan may intend to file a lengthy reply that raises new arguments for the first time. Any attempt to do so would be entirely improper. But, out of an abundance of caution, should Mr. Morgan do so, Harvest reserves the right to request a surreply to address any arguments or evidence not advanced in his Motion.

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in this action, but also to the purpose of Rule 49(a). Thus, it must be denied. Mr. Morgan chose to proceed against only Mr. Lujan at trial and he must now bear the burden of that choice.

DATED this 16th day of August, 2018.

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

I certify that I am an employee of BAILEY❖KENNEDY and that on the 16th day of August, 2018, service of the foregoing **DEFENDANT HARVEST MANAGEMENT SUB LLC'S OPPOSITION TO PLAINTIFF'S MOTION FOR ENTRY OF JUDGMENT** was made by mandatory electronic service through the Eighth Judicial District Court's electronic filing system and/or by depositing a true and correct copy in the U.S. Mail, first class postage prepaid, and addressed to the following at their last known address:

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EXHIBIT 5

EXHIBIT 5

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DISTRICT COURT

CLARK COUNTY, NEVADA

AARON M. MORGAN, individually, Plaintiff, vs. DAVID E. LUJAN, individually; HARVEST MANAGEMENT SUB LLC; a Foreign-Limited-Liability Company; DOES 1 through 20; ROE BUSINESS ENTITIES 1 through 20, inclusive jointly and severally, Defendants.	Case No. A-15-718679-C Dept. No. XI

NOTICE OF ENTRY OF ORDER ON PLAINTIFF'S MOTION FOR ENTRY OF JUDGMENT

PLEASE TAKE NOTICE that an Order on Plaintiff's Motion for Entry of Judgment was entered on November 28, 2018.

/ / /

/ / /

/ / /

A true and correct copy is attached hereto.

DATED this 28th day of November, 2018.

BAILEY❖KENNEDY

By: */s/ Sarah E. Harmon*
DENNIS L. KENNEDY
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CERTIFICATE OF SERVICE

I certify that I am an employee of BAILEY❖KENNEDY and that on the 28th day of November, 2018, service of the foregoing **NOTICE OF ENTRY OF ORDER ON PLAINTIFF'S MOTION FOR ENTRY OF JUDGMENT** was made by mandatory electronic service through the Eighth Judicial District Court's electronic filing system and/or by depositing a true and correct copy in the U.S. Mail, first class postage prepaid, and addressed to the following at their last known address:

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Las Vegas, Nevada 89101

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Bryan@richardharrislaw.com

and

MICAH S. ECHOLS
TOM W. STEWART
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Attorney for Defendant
DAVID E. LUJAN

/s/ Josephine Baltazar
Employee of BAILEY❖KENNEDY

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Attorneys for Defendant
HARVEST MANAGEMENT SUB LLC

DISTRICT COURT

CLARK COUNTY, NEVADA

PLEASE NOTE DEPT. CHANGE

AARON M. MORGAN, individually, Plaintiff, vs. DAVID E. LUJAN, individually; HARVEST MANAGEMENT SUB LLC; a Foreign-Limited-Liability Company; DOES 1 through 20; ROE BUSINESS ENTITIES 1 through 20, inclusive jointly and severally, Defendants.	Case No. A-15-718679-C Dept. No. [redacted] XI **ORDER ON PLAINTIFFS' MOTION FOR ENTRY OF JUDGMENT** **Date of Hearing: November 6, 2018** **Time of Hearing: 9:00 A.M.**

On November 6, 2018, at 9:00 a.m., the Motion for Entry of Judgment came before the Court. Tom W. Stewart of Marquis Aurbach Coffing P.C. and Bryan A. Boyack of Richard Harris Law Firm appeared on behalf of Plaintiff Aaron Morgan and Dennis L. Kennedy, Sarah E. Harmon, and Andrea M. Champion of Bailey❖Kennedy appeared on behalf of Defendant Harvest Management Sub LLC.

///

The Court, having examined the briefs of the parties, the records and documents on file, and having heard argument of counsel, and for good cause appearing,

HEREBY ORDERS that the Motion for Entry of Judgment shall be, and hereby is, **DENIED**.

DATED this 26 day of November, 2018.

DISTRICT COURT JUDGE

Respectfully submitted by:

BAILEY❖KENNEDY, LLP

By: _____
DENNIS L. KENNEDY
SARAH E. HARMON
JOSHUA P. GILMORE
ANDREA M. CHAMPION
8984 Spanish Ridge Avenue
Las Vegas, Nevada 89148
Attorneys for Defendant Harvest Management Sub LLC

Approved as to form and content by:

MARQUIS AURBACH COFFING P.C.

By: _____
MICAH S. ECHOLS
TOM W. STEWART
1001 Park Run Drive
Las Vegas, Nevada 89145
Attorneys for Plaintiff Aaron Morgan

EXHIBIT 6

EXHIBIT 6

TRAN

DISTRICT COURT
CLARK COUNTY, NEVADA
* * * * *

AARON MORGAN	.	
	.	
Plaintiff	.	CASE NO. A-15-718679-C
	.	
vs.	.	
	.	DEPT. NO. XI
DAVID LUJAN, et al.	.	
	.	**Transcript of**
Defendants	.	**Proceedings**
. . . . .	.	

BEFORE THE HONORABLE ELIZABETH GONZALEZ, DISTRICT COURT JUDGE

HEARING ON PLAINTIFF'S MOTION FOR ENTRY OF JUDGMENT

TUESDAY, NOVEMBER 6, 2018

APPEARANCES:

FOR THE PLAINTIFF:	BRYAN A. BOYACK, ESQ. THOMAS W. STEWART, ESQ.
FOR THE DEFENDANTS:	DENNIS L. KENNEDY, ESQ. SARAH E. HARMON, ESQ. ANDREA M. CHAMPION, ESQ.
COURT RECORDER:	TRANSCRIPTION BY:
JILL HAWKINS District Court	FLORENCE HOYT Las Vegas, Nevada 89146

Proceedings recorded by audio-visual recording, transcript produced by transcription service.

employee, discusses the facts of the accident. Never does she bring up on cross or direct examination he was on a break, we aren't on the hook here, or any assertion of that. So this is kind of after the fact them trying to escape the clear liability that was presented, although it wasn't stated on the special verdict form, defendant Lujan, defendant Harvest Management. It was the defendant.

THE COURT: Is there any instruction on either negligent entrustment or vicarious liability in the pack of jury instructions?

MR. BOYACK: I don't believe so, Your Honor.

THE COURT: Yeah. Okay. Thanks.

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

MR. STEWART: Thank you, Your Honor.

MR. BOYACK: Thank you, Your Honor.

MR. KENNEDY: And just for purposes of clarification, that judgment will say that the claims against

Harvest Management are dismissed?

THE COURT: It will not, Mr. Kennedy.

MR. KENNEDY: Okay. Well, I'll just have to file a motion.

THE COURT: That's why I say we have to do something next.

MR. KENNEDY: Okay. I'm happy to do that.

THE COURT: I'm going one step at a time.

THE PROCEEDINGS CONCLUDED AT 9:13 A.M.

* * * * *

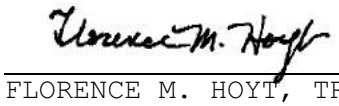
CERTIFICATION

I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE AUDIO-VISUAL RECORDING OF THE PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

AFFIRMATION

I AFFIRM THAT THIS TRANSCRIPT DOES NOT CONTAIN THE SOCIAL SECURITY OR TAX IDENTIFICATION NUMBER OF ANY PERSON OR ENTITY.

FLORENCE HOYT
Las Vegas, Nevada 89146



FLORENCE M. HOYT, TRANSCRIBER

1/17/19

DATE

EXHIBIT 7

EXHIBIT 7

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Attorneys for Plaintiff, Aaron Morgan

DISTRICT COURT

CLARK COUNTY, NEVADA

AARON M. MORGAN, individually,

Plaintiff,

vs.

DAVID E. LUJAN, individually; HARVEST MANAGEMENT SUB LLC; a Foreign Limited-Liability Company; DOES 1 through 20; ROE BUSINESS ENTITIES 1 through 20, inclusive jointly and severally,

Defendants.

Case No.: A-15-718679-C
Dept. No.: XI

NOTICE OF ENTRY OF JUDGMENT

MARQUIS AURBACH COFFING
10001 Park Run Drive
Las Vegas, Nevada 89145
(702) 382-0711 FAX: (702) 382-5816

MAC:15167-001 3612459_1

Please take notice that the Judgment Upon Jury Verdict was filed in the above-captioned matter on December 17, 2018. A copy of the Judgment Upon Jury Verdict is attached hereto as **Exhibit 1**.

Dated this 2nd day of January, 2019.

MARQUIS AURBACH COFFING

By /s/ Micah S. Echols
Micah S. Echols, Esq.
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CERTIFICATE OF SERVICE

I hereby certify that the foregoing **NOTICE OF ENTRY OF JUDGMENT** was submitted electronically for filing and/or service with the Eighth Judicial District Court on the 2nd day of January, 2019. Electronic service of the foregoing document shall be made in accordance with the E-Service List as follows:[1]

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Attorneys for Defendant David E. Lujan

/s/ Leah Dell
Leah Dell, an employee of
Marquis Aurbach Coffing

[1] Pursuant to EDCR 8.05(a), each party who submits an E-Filed document through the E-Filing System consents to electronic service in accordance with NRCP 5(b)(2)(D).

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Exhibit 1

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Attorneys for Plaintiff, Aaron M. Morgan

RICHARD HARRIS LAW FIRM

DISTRICT COURT

CLARK COUNTY, NEVADA

AARON M. MORGAN, individually, Plaintiff, vs. DAVID E. LUJAN, individually; HARVEST MANAGEMENT SUB LLC; a Foreign Limited-Liability Company; DOES 1 through 20; ROE BUSINESS ENTITIES 1 through 20, inclusive jointly and severally, Defendants.	CASE NO.: A-15-718679-C Dept. No.: XI **JUDGMENT UPON THE JURY VERDICT**

12-13-18P01:10 RCVD

JUDGMENT UPON THE JURY VERDICT

This action came on for trial before the Court and the jury, the Honorable Linda Marie Bell, District Court Judge, presiding,[1] and the issues having been duly tried and the jury having duly rendered its verdict.[2]

IT IS ORDERED AND ADJUDGED that PLAINTIFF, AARON M. MORGAN, have a recovery against DEFENDANT, DAVID E. LUJAN, for the following sums:

Past Medical Expenses	$208,480.00
Future Medical Expenses	+$1,156,500.00
Past Pain and Suffering	+$116,000.00
Future Pain and Suffering	+$1,500,000.00
Total Damages	**$2,980,980.00**

IT IS FURTHER ORDERED AND ADJUDGED that AARON M. MORGAN's past damages of $324,480 shall bear Pre-Judgment interest in accordance with *Lee v. Ball*, 121 Nev. 391, 116 P.3d 64 (2005) and NRS 17.130 at the rate of 5.00% per annum plus 2% from the date of service of the Summons and Complaint on May 28, 2015, through the entry of the Special Verdict on April 9, 2018:

PRE-JUDGMENT INTEREST ON PAST DAMAGES:

05/28/15 through 04/09/18 = **$65,402.72**

[(1,051 days) at (prime rate (5.00%) plus 2 percent = 7.00%) on $324,480 past damages]

[Pre-Judgment Interest is approximately $62.23 per day]

PLAINTIFF'S TOTAL JUDGMENT

Plaintiff's total judgment is as follows:

Total Damages:	**$2,980,980.00**
Prejudgment Interest:	**$65,402.72**
TOTAL JUDGMENT	**$3,046,382.72**

[1] This case was reassigned to the Honorable Elizabeth Gonzalez, District Court Judge, in July 2018.

[2] *See* Special Verdict filed on April 9, 2018, attached as **Exhibit 1**.

Now, THEREFORE, Judgment Upon the Jury Verdict in favor of the Plaintiff is as follows:

PLAINTIFF, AARON M. MORGAN, is hereby awarded **$3,046,382.72** against DEFENDANT, DAVID E. LUJAN, which shall bear post-judgment interest at the adjustable legal rate from the date of the entry of judgment until fully satisfied. Post-judgment interest at the current 7.00% rate accrues interest at the rate of $584.24 per day.

Dated this 13 day of Dec., 2018.

HONORABLE ELIZABETH GONZALEZ
DISTRICT COURT JUDGE
DEPARTMENT 11

Respectfully Submitted by:

Dated this 12th day of December, 2018.

MARQUIS AURBACH COFFING

By _____
Micah S. Echols, Esq.
Nevada Bar No. 8437
Tom W. Stewart, Esq.
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10001 Park Run Drive
Las Vegas, Nevada 89145
Attorneys for Plaintiff, Aaron M. Morgan

[CASE NO. A-15-718679-C—JUDGMENT UPON THE JURY VERDICT]

RICHARD HARRIS LAW FIRM

Exhibit 1

DISTRICT COURT

CLARK COUNTY, NEVADA

CASE NO: A-15-718679-C

DEPT. NO: VII

AARON MORGAN,

Plaintiff,

vs.

DAVID LUJAN,

Defendant.

SPECIAL VERDICT

We, the jury in the above-entitled action, find the following special verdict on the questions submitted to us:

QUESTION NO. 1: Was Defendant negligent?

ANSWER: Yes ✓ No _____

If you answered no, stop here. Please sign and return this verdict.

If you answered yes, please answer question no. 2.

QUESTION NO.2: Was Plaintiff negligent?

ANSWER: Yes _____ No ✓

If you answered yes, please answer question no. 3.

If you answered no, please skip to question no. 4.

///

A-15-718679-C
SJV
Special Jury Verdict
4738215

2

QUESTION NO. 3: What percentage of fault do you assign to each party?

Defendant: 100

Plaintiff: 0

Total: 100%

Please answer question 4 without regard to you answer to question 3.

QUESTION NO. 4: What amount do you assess as the total amount of Plaintiff's damages? (Please do not reduce damages based on your answer to question 3, if you answered question 3. The Court will perform this task.)

Past Medical Expenses	$ 208,480.00
Future Medical Expenses	$ 1,156,500.00
Past Pain and Suffering	$ 116,000.00
Future Pain and Suffering	$ 1,500,000.00
TOTAL	$ 2,980,980.00

DATED this 9th day of April, 2018.

Arthur J. St. Laurent

FOREPERSON

ARTHUR J. ST. LAURENT

EXHIBIT 8

EXHIBIT 8

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Attorneys for Plaintiff, Aaron Morgan

DISTRICT COURT

CLARK COUNTY, NEVADA

AARON M. MORGAN, individually, Plaintiff, vs. DAVID E. LUJAN, individually; HARVEST MANAGEMENT SUB LLC; a Foreign Limited-Liability Company; DOES 1 through 20; ROE BUSINESS ENTITIES 1 through 20, inclusive jointly and severally, Defendants.	Case No.: A-15-718679-C Dept. No.: XI

NOTICE OF APPEAL

Plaintiff, Aaron M. Morgan, by and through his attorneys of record, Marquis Aurbach Coffing and the Richard Harris Law Firm, hereby appeals to the Supreme Court of Nevada from: (1) the Order Denying Plaintiff's Motion for Entry of Judgment, which was filed on

November 28, 2018 and is attached as **Exhibit 1**; and (2) the Judgment Upon the Jury Verdict, which was filed on December 17, 2018 and is attached as **Exhibit 2**.

Dated this 18th day of December, 2018.

MARQUIS AURBACH COFFING

By /s/ Micah S. Echols
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CERTIFICATE OF SERVICE

I hereby certify that the foregoing **NOTICE OF APPEAL** was submitted electronically for filing and/or service with the Eighth Judicial District Court on the 18th day of December, 2018. Electronic service of the foregoing document shall be made in accordance with the E-Service List as follows:[1]

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Attorneys for Defendant David E. Lujan

/s/ Leah Dell
Leah Dell, an employee of
Marquis Aurbach Coffing

[1] Pursuant to EDCR 8.05(a), each party who submits an E-Filed document through the E-Filing System consents to electronic service in accordance with NRCP 5(b)(2)(D).

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Exhibit 1

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Attorneys for Defendant
HARVEST MANAGEMENT SUB LLC

DISTRICT COURT

CLARK COUNTY, NEVADA

PLEASE NOTE DEPT. CHANGE

AARON M. MORGAN, individually, Plaintiff, vs. DAVID E. LUJAN, individually; HARVEST MANAGEMENT SUB LLC; a Foreign-Limited-Liability Company; DOES 1 through 20; ROE BUSINESS ENTITIES 1 through 20, inclusive jointly and severally, Defendants.	Case No. A-15-718679-C Dept. No. [redacted] XI **ORDER ON PLAINTIFFS' MOTION FOR ENTRY OF JUDGMENT** **Date of Hearing: November 6, 2018** **Time of Hearing: 9:00 A.M.**

On November 6, 2018, at 9:00 a.m., the Motion for Entry of Judgment came before the Court. Tom W. Stewart of Marquis Aurbach Coffing P.C. and Bryan A. Boyack of Richard Harris Law Firm appeared on behalf of Plaintiff Aaron Morgan and Dennis L. Kennedy, Sarah E. Harmon, and Andrea M. Champion of Bailey❖Kennedy appeared on behalf of Defendant Harvest Management Sub LLC.

///

The Court, having examined the briefs of the parties, the records and documents on file, and having heard argument of counsel, and for good cause appearing,

HEREBY ORDERS that the Motion for Entry of Judgment shall be, and hereby is, **DENIED**.

DATED this 26 day of November, 2018.

DISTRICT COURT JUDGE

Respectfully submitted by:

BAILEY❖KENNEDY, LLP

By: _____
DENNIS L. KENNEDY
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JOSHUA P. GILMORE
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Attorneys for Defendant Harvest Management Sub LLC

Approved as to form and content by:

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By: _____
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Attorneys for Plaintiff Aaron Morgan

Exhibit 2

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Attorneys for Defendant
HARVEST MANAGEMENT SUB LLC

DISTRICT COURT

CLARK COUNTY, NEVADA

PLEASE NOTE DEPT. CHANGE

AARON M. MORGAN, individually, Plaintiff, vs. DAVID E. LUJAN, individually; HARVEST MANAGEMENT SUB LLC; a Foreign-Limited-Liability Company; DOES 1 through 20; ROE BUSINESS ENTITIES 1 through 20, inclusive jointly and severally, Defendants.	Case No. A-15-718679-C Dept. No. [redacted] XI **ORDER ON PLAINTIFFS' MOTION FOR ENTRY OF JUDGMENT** **Date of Hearing: November 6, 2018** **Time of Hearing: 9:00 A.M.**

On November 6, 2018, at 9:00 a.m., the Motion for Entry of Judgment came before the Court. Tom W. Stewart of Marquis Aurbach Coffing P.C. and Bryan A. Boyack of Richard Harris Law Firm appeared on behalf of Plaintiff Aaron Morgan and Dennis L. Kennedy, Sarah E. Harmon, and Andrea M. Champion of Bailey❖Kennedy appeared on behalf of Defendant Harvest Management Sub LLC.

///

The Court, having examined the briefs of the parties, the records and documents on file, and having heard argument of counsel, and for good cause appearing,

HEREBY ORDERS that the Motion for Entry of Judgment shall be, and hereby is, **DENIED**.

DATED this 26 day of November, 2018.

DISTRICT COURT JUDGE

Respectfully submitted by:

BAILEY❖KENNEDY, LLP

By: _____
DENNIS L. KENNEDY
SARAH E. HARMON
JOSHUA P. GILMORE
ANDREA M. CHAMPION
8984 Spanish Ridge Avenue
Las Vegas, Nevada 89148
Attorneys for Defendant Harvest Management Sub LLC

Approved as to form and content by:

MARQUIS AURBACH COFFING P.C.

By: _____
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Attorneys for Plaintiff Aaron Morgan

EXHIBIT 9

EXHIBIT 9

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Attorneys for Defendant
HARVEST MANAGEMENT SUB LLC

DISTRICT COURT

CLARK COUNTY, NEVADA

AARON M. MORGAN, individually, Plaintiff, vs. DAVID E. LUJAN, individually; HARVEST MANAGEMENT SUB LLC; a Foreign-Limited-Liability Company; DOES 1 through 20; ROE BUSINESS ENTITIES 1 through 20, inclusive jointly and severally, Defendants.	Case No. A-15-718679-C Dept. No. XI **DEFENDANT HARVEST MANAGEMENT SUB LLC'S MOTION FOR ENTRY OF JUDGMENT** Hearing Date: Hearing Time:

Defendant Harvest Management Sub LLC ("Harvest"), hereby requests that the Court enter judgment in favor of Harvest on any and all claims for relief alleged by Plaintiff Aaron Morgan ("Mr. Morgan") in this action. (A proposed Judgment is attached hereto as Exhibit A.) Mr. Morgan failed to present any evidence in support of his claims, failed to refute the defendants' evidence offered in defense of these claims, failed to submit these claims to the jury for determination, and has ostensibly chosen to abandon his claims against Harvest.

/ / /

This Motion is made and based on the following memorandum of points and authorities, the papers and pleadings on file, and any oral argument the Court may allow.

DATED this 21st day of December, 2018.

BAILEY❖KENNEDY

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

Attorneys for Defendant
HARVEST MANAGEMENT SUB LLC

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702.562.8820

NOTICE OF MOTION

PLEASE TAKE NOTICE that Defendant Harvest Management Sub LLC's Motion for Entry of Judgment will come on for hearing before the Court in Department XI, on the 25 day of January, 2019, at the hour of In Chambers __:___ __.m., or as soon thereafter as counsel can be heard.

DATED this 21st day of December, 2018.

BAILEY❖KENNEDY

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

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Although there is some confusion as to what cause of action Mr. Morgan asserted against Harvest in this action — negligent entrustment or vicarious liability — there is no dispute that at the recent trial of this matter, Mr. Morgan wholly failed to pursue — and in fact appears to have abandoned — his claim for relief against Harvest. Specifically:

- He did not reference Harvest in his introductory remarks to the jury regarding the identity of the Parties and expected witnesses, (Ex. 10,[1] at 17:2-24, 25:7-26:3);
- He did not mention Harvest or his claim against Harvest during jury voir dire, (*id.* at 33:2-93:22, 97:6-188:21, 191:7-268:12; Ex. 11,[2] at 3:24-65:7, 67:4-110:22);
- He did not reference Harvest or his claim against Harvest in his opening statement, (Ex. 11, at 126:7-145:17);
- He offered no evidence regarding Harvest's liability for his damages;
- He did not elicit any testimony from any witness that could have supported his claim against Harvest;
- He did not reference Harvest or his claim against Harvest in his closing argument or rebuttal closing argument, (Ex. 12,[3] at 121:4-136:19, 157:13-161:10);
- He did not include his claim against Harvest in the jury instructions, (Ex. 13[4]); and
- He did not include Harvest in the Special Verdict Form, never asked the jury to assess liability against Harvest, and, in fact, gave the jury no option to find Harvest liable for anything, (Ex. 14[5]).

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[1] Excerpts of Recorder's Tr. of Hrg. Civil Jury Trial (Apr. 2, 2018) are attached as Exhibit 10, at Vol. III of App. at H384-H619.

[2] Excerpts of Recorder's Tr. of Hrg. Civil Jury Trial (Apr. 3, 2018) are attached as Exhibit 11, at Vol. IV of App. at H620-H748.

[3] Excerpts of Recorder's Tr. of Hrg. Civil Jury Trial (Apr. 9, 2018) are attached hereto as Exhibit 12, at Vol. IV of App. at H749-H774.

[4] A true and correct copy of the Jury Instructions (Apr. 9, 2018) is attached as Exhibit 13, at Vol. IV of App. at H775-H814.

[5] A true and correct copy of the Special Verdict (Apr. 9, 2018) is attached as Exhibit 14, at Vol. IV of App. at H815-816.

In addition to abandoning his claims against Harvest, Mr. Morgan also failed to refute the evidence offered by the defendants at trial which established that Harvest could not, as a matter of law, be liable for either negligent entrustment or vicarious liability — specifically, (1) David Lujan's ("Mr. Lujan") testimony that he was on a lunch break when the accident occurred; and (2) Mr. Lujan's testimony that he had never been in an accident before.

Given the lack of *any* evidence offered at trial against Harvest, Mr. Morgan's claims against Harvest should be dismissed with prejudice and judgment should be entered in favor of Harvest as to Mr. Morgan's express claim for negligent entrustment and his implied claim for vicarious liability.

II. RELEVANT FACTS AND PROCEDURAL HISTORY

A. The Pleadings.

On May 20, 2015, Mr. Morgan filed a Complaint against Mr. Lujan and Harvest. (*See generally* Ex. 1[6].) The only claim alleged against Harvest in the Complaint is captioned "Vicarious Liability/Respondeat Superior," but the allegations of the claim are more akin to a claim for ***negligent entrustment***. (*Id.* at ¶¶ 15-22 (alleging that Harvest negligently entrusted the vehicle to Mr. Lujan despite the fact that it knew or should have known that Mr. Lujan was an incompetent, inexperienced, or reckless driver).) Further, the cause of action fails to allege that Mr. Lujan was acting within the course and scope of his employment at the time of the accident. (*Id*.) Rather, the only reference to "course and scope" in the entire Complaint is as follows:

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

(*Id.* at ¶ 9 (emphasis added).)

On June 16, 2015, Mr. Lujan and Harvest filed Defendants' Answer to Plaintiff's Complaint. (*See generally* Ex. 2.[7]) The Defendants denied Paragraph 9 of the Complaint, including the

[6] A true and correct copy of the Complaint (May 20, 2015) is attached as Exhibit 1, at Vol. I of App. at H001-H006.

[7] A true and correct copy of Defs.'Answer to Pl.'s Compl. (June 16, 2015) is attached as Exhibit 2, at Vol. I of App. at H007-H013.

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purported allegation that Mr. Lujan was acting within the course and scope of his employment at the time of the accident. (Ex. 1, at ¶ 9; Ex. 2, at 2:8-9.) Harvest admitted that it employed Mr. Lujan as a driver, that it owned the vehicle involved in the accident, and that it had entrusted control of the vehicle to Mr. Lujan. (Ex. 1, at ¶¶ 16-18; Ex. 2, at 3:7-8.) However, Harvest denied that: (i) Mr. Lujan was incompetent, inexperienced, or reckless in the operation of the vehicle; (ii) it knew or should have known that he was incompetent, inexperienced, or reckless in the operation of motor vehicles; (iii) Mr. Morgan was injured as a proximate consequence of Harvest's alleged negligent entrustment of the vehicle to Mr. Lujan; and (iv) Mr. Morgan suffered damages as a direct and proximate result of Harvest's alleged negligent entrustment of the vehicle to Mr. Lujan. (Ex. 1, at ¶¶ 19-22; Ex. 2, at 3:9-10.)[8]

B. Discovery.

On April 14, 2016, Mr. Morgan propounded interrogatories on Harvest. (*See generally* Ex. 4.[9]) The interrogatories included a request regarding the background checks Harvest performed prior to hiring Mr. Lujan, (*id.* at 6:25-7:2), and a request regarding any disciplinary actions Harvest had taken against Mr. Lujan in the five years preceding the accident which related to Mr. Lujan's operation of a Harvest vehicle, (*id.* at 7:15-19). There were no interrogatories propounded upon Harvest which concerned whether Mr. Lujan was acting within the course and scope of his employment at the time of the accident. (*See generally* Ex. 4.)

On October 12, 2016, Harvest served its Responses to Mr. Morgan's Interrogatories. (*See generally* Ex. 5.[10]) Harvest answered Interrogatory No. 5, regarding the pre-hiring background checks relating to Mr. Lujan, as follows:

> Mr. Lujan was hired in 2009. As part of the qualification process, *a pre-employment DOT drug test was conducted as well as a criminal background screen and a motor vehicle record*. Also, since he held a

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[8] Harvest's and Mr. Lujan's Answer was admitted into evidence during the second trial, as Exhibit 26. (Excerpts of Recorder's Tr. of Hrg. Civil Jury Trial (Apr. 5, 2018), attached hereto as Exhibit 3, at Vol. I of App. at H014-H029, at 169:25-170:17.)

[9] A true and correct copy of Pl.'s First Set of Interrogs. to Def. Harvest Mgmt. Sub LLC (Apr. 14, 2016) is attached as Exhibit 4, at Vol. 1 of App. at H030-H038.

[10] A true and correct copy of Def. Harvest Mgmt. Sub, LLC's Resps. to Pl.'s First Set of Interrogs. (Oct. 12, 2016) is attached as Exhibit 5, at Vol. I of App. at H039-H046.

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> CDL, an *inquiry with past/current employers within three years of the date of application was conducted and was* ***satisfactory***. A *DOT physical medical certification was obtained and monitored for renewal* as required. *MVR was ordered yearly to monitor activity of personal driving history* and ***always came back clear***. Required Drug and Alcohol Training was also completed at the time of hire and included the effects of alcohol use and controlled substances use on an individual's health, safety, work environment and personal life, signs of a problem with these and available methods of intervention.

(*Id.* at 3:2-19 (emphasis added).) Further, in response to Interrogatory No. 8, regarding past disciplinary actions taken against Mr. Lujan, Harvest's response was "***None***." (*Id.* at 4:17-23 (emphasis added).)[11]

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

C. <u>The First Trial.</u>

This case was first tried to a jury on November 6, 2017 through November 8, 2017. (*See generally* Ex. 7[12]; Ex. 8.[13]) At the start of the first trial, when the Court asked the prospective jurors if they knew any of the Parties or their counsel, the Court asked about Mr. Morgan, Plaintiff's counsel, Mr. Lujan, and defense counsel. (Ex. 7, at 36:24-37:25.) No mention was made of Harvest, and no objection was raised by Mr. Morgan. (*Id.*) Further, when the Court asked counsel to name their witnesses to determine if the prospective jurors were familiar with any witnesses, no officer, director, employee, or other representative of Harvest was named as a potential witness. (*Id.* at 41:1-21.)

Mr. Morgan also never referenced Harvest, his express claim for negligent entrustment, or his attempted claim for vicarious liability during voir dire or his opening statement. (*Id.* at 45:25-

[11] Portions of Harvest's Responses to Mr. Morgan's Interrogatories were read to the jury during the second trial, (Excerpts of Recorder's Tr. of Hrg. Civil Jury Trial (Apr. 6, 2018), attached hereto as Exhibit 6, at Vol. I of App. at H047-H068, at 10:22-13:12).

[12] Excerpts of Tr. of Jury Trial (Nov. 6, 2017) are attached as Exhibit 7, at Vol. II of App. at H069-H344.

[13] Excerpts of Tr. of Jury Trial (Nov. 8, 2017) are attached as Exhibit 8, at Vol. III of App. at H345-H357.

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121:20, 124:13-316:24; Ex. 9,[14] at 6:4-29:1.) In fact, Harvest was not mentioned until the third day of the first trial, while Mr. Lujan was on the witness stand. Mr. Lujan's relevant testimony is as follows:

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

(Ex. 8, at 108:23-109:8.)

Mr. Lujan also provided the only evidence during trial which was relevant to claims of either negligent entrustment or vicarious liability:

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

(*Id.* at 111:16-24 (emphasis added).)

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

(*Id.* at 112:8-10 (emphasis added).)

After counsel for Mr. Morgan completed his examination of Mr. Lujan, the court permitted the jury to submit its own questions. A juror — not Mr. Morgan — asked Mr. Lujan:

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

[14] Excerpts of Tr. of Jury Trial (Nov. 7, 2017) are attached as Exhibit 9, at Vol. III of App. at H358-H383.

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(*Id.* at 131:21-24, 132:18, 132:22-133:2 (emphasis added).)

Later that day, the first trial ended prematurely as a result of a mistrial, when defense counsel inquired about a pending DUI charge against Mr. Morgan. (*Id.* at 150:15-152:14, 166:12-18.)

D. <u>The Second Trial.</u>

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

The second trial of this action commenced on April 2, 2018. (*See generally* Ex. 10.) The second trial was very similar to the first trial regarding the lack of reference to and the lack of evidence offered regarding Harvest. First, Harvest was not officially identified as a party when the court requested that counsel identify themselves and the Parties for the jury. In fact, counsel for the defense merely stated as follows:

> MR. GARDNER: Hello everyone. What a way to start a Monday, right? In my firm we've got myself, Doug Gardner and then Brett South, who is not here, but this is Doug Rands, and then my client, Erica[15] is right back here. Let's see, I think that's it for me.

(*Id.* at 17:15-18.) Mr. Morgan did not object or inform the prospective jurors that the case also involved Harvest, or a corporate defendant, or even the employer of Mr. Lujan. (*Id.* at 17:19-24.)

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

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

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[15] In the second trial, Mr. Lujan chose not to attend. Mr. Gardner's introduction referenced Erica Janssen, a representative of Harvest.

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(*Id.* at 25:6-14 (emphasis added).) Again, consistent with his approach in the first trial and throughout the remainder of this second trial, Mr. Morgan did not object or clarify that the case also involved a claim against Mr. Lujan's employer, Harvest. (*Id.* at 25:15-22.)

Finally, when the Court asked the Parties to identify the witnesses they planned to call during trial, no mention was made of any officer, director, employee, or other representative of Harvest — not even the representative, Erica Janssen, who was attending trial. (*Id.* at 25:15-26:3.)

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

Just as with the first trial, Mr. Morgan failed to reference Harvest or his claim for negligent entrustment/vicarious liability during voir dire. (*Id.* at 33:2-93:22, 97:6-188:21, 191:7-268:12; Ex. 11, at 3:24-65:7, 67:4-110:22.) Moreover, during Mr. Morgan's opening statement, Plaintiff's counsel never made a single reference to Harvest, a corporate defendant, vicarious liability, negligent entrustment, or even the fact that there were two defendants in the action. (Ex. 11, at 126:7-145:17.) Plaintiff's counsel merely stated:

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

(*Id.* at 126:15-25 (emphasis added).) Plaintiff's counsel made no reference to any evidence to be presented during the trial which would demonstrate that Mr. Lujan was acting in the course and scope of his employment at the time of the accident or that Harvest negligently entrusted the vehicle to Mr. Lujan — rather, he acknowledged that Mr. Lujan was at lunch at the time of the accident. (*Id.* at 126:7-145:17.)

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

On the fourth day of the second trial, Mr. Morgan called Erica Janssen, the Rule 30(b)(6) representative of Harvest, as a witness during his case in chief. (Ex. 3, at 164:13-23.) Ms. Janssen

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confirmed that it was Harvest's understanding that Mr. Lujan had been at a park in a shuttlebus having lunch and that the accident occurred as he exited the park:

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

(*Id.* at 168:15-23 (emphasis added).)

Mr. Morgan never asked Ms. Janssen where she was employed, her title, whether Harvest employed Mr. Lujan, what Mr. Lujan's duties were, or any other questions that might have elicited evidence to support a claim for negligent entrustment or vicarious liability. (*Id.* at 164:21-177:17; Ex. 6, at 4:2-6:1.) In fact, it wasn't until redirect examination that Mr. Morgan even referenced the fact that Ms. Janssen was in risk management for Harvest:

> [MR. CLOWARD:]
> Q: So where it says, on interrogatory number 14, and you can follow along with me:
>
> > "Please provide the full name of the person answering the interrogatories on behalf of the Defendant, Harvest Management Sub, LLC, and state in what capacity your [*sic*] are authorized to respond on behalf of said Defendant.
> > "A. Erica Janssen, Holiday Retirement, Risk Management."
>
> A: Yes.

(Ex. 6, at 11:18-25.) Other than this acknowledgement that Ms. Janssen executed interrogatory responses on behalf of Harvest, Mr. Morgan, again, failed to elicit any evidence on redirect examination to support a claim for negligent entrustment or vicarious liability. (*Id.* at 9:23-12:6, 13:16-15:6.)

On the fifth day of the second trial, Mr. Morgan rested his case (*id.* at 55:6-7), again, with no evidence presented to support a claim for vicarious liability or negligent entrustment — i.e., evidence of Mr. Lujan's driving history; Harvest's knowledge of Mr. Lujan's driving history;

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disciplinary actions Harvest took against Mr. Lujan prior to the accident; background checks Harvest performed on Mr. Lujan; alcohol and drug testing Harvest performed on Mr. Lujan; Mr. Lujan's job duties; Harvest's policy regarding the use of company vehicles to drive to and from lunch; whether Mr. Lujan was required to clock-in and clock-out during his shifts; or whether any residents of the retirement home were passengers on the bus at the time of the accident, among other facts.[16]

During the defense's case in chief — not Mr. Morgan's — defense counsel read portions of Mr. Lujan's testimony from the first trial into the record. (*Id.* at 195:7-203:12.) As referenced above, this testimony included the following facts: (1) Mr. Lujan worked as a bus driver for Montara Meadows at the time of the accident; (2) Harvest was the "corporate office" for Montara Meadows; (3) the accident occurred when Mr. Lujan was leaving Paradise Park; and (4) Mr. Lujan had never been in an "accident like that" or an accident in a bus before. (*Id.* at 195:8-17, 195:25-196:10, 196:19-24, 197:8-10.)

This testimony, coupled with Ms. Janssen's testimony that Mr. Lujan was on his lunch break at the time of the accident, is the complete universe of evidence offered at the second trial that even tangentially concerns Harvest.

4. There Are No Jury Instructions Pertaining to the Claim Against Harvest.

Mr. Morgan never submitted any jury instructions ***pertaining to vicarious liability, actions within the course and scope of employment, negligent entrustment, or corporate liability***. (*See generally* Ex. 13.) Again, this is entirely consistent with Mr. Morgan's trial strategy. He all but ignored Harvest throughout the trial process.

5. Mr. Morgan Failed to Include Harvest in the Special Verdict Form.

On the last day of trial, before commencing testimony for that day, the Court provided the Parties with a sample jury form that the Court had used in its last car accident trial.

> THE COURT: Take a look and see if – will you guys look at that verdict form? *I know it doesn't have the right caption. I know it's just the one we used the last trial*. See if that looks sort of okay.

[16] It should be noted that despite the lack of evidence on these issues, Plaintiff's counsel stated, during his closing argument, that there were no passengers on the bus at the time of the accident. (Ex. 12, at 124:15-17) ("That this company transporting our elderly members of the community is going to follow the rules of the road. ***Aren't we lucky that there weren't other people on the bus?*** Aren't we lucky?") (emphasis added)).

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

(Ex. 12, at 5:20-6:1 (emphasis added).) Later that same day, after the defense rested its case, Plaintiff's counsel informed the Court that it only wanted to make one change to the special verdict form that the Court had proposed:

> MR. BOYACK: On the verdict form we just would like the past and future medical expenses and pain and suffering to be differentiated.
> THE COURT: Yeah. Let me see.
> MR. BOYACK: Just instead of the general.
> THE COURT: That's fine. That's fine.
> MR. BOYACK: Yeah. ***That's the only change***.
> THE COURT: ***That was just what we had laying around, so***.
> MR. BOYACK: Yeah.
> THE COURT: So you want – got it. Yeah. That looks great. I actually prefer that as well.
> MR. BOYACK: Yeah. ***That was the only modification***.
> THE COURT: That's better if we have some sort of issue.
> MR. BOYACK: Right.

(*Id.* at 116:11-23 (emphasis added).) The Special Verdict Form approved by Mr. Morgan — after his edits were accepted and incorporated by the Court — makes no mention of Harvest (which is entirely consistent with Mr. Morgan's trial strategy):

- The Special Verdict form only asked the jury to determine whether the "***Defendant***" was negligent, (Ex. 14, at 1:17 (emphasis added));
- The Special Verdict form did not ask the jury to find Harvest liable for anything, (*id.*); and
- The Special Verdict form directed the jury to apportion fault only between "***Defendant***" and Plaintiff, with the percentage of fault totaling 100 percent, (*id.* at 2:1-4 (emphasis added)).

Thus, Mr. Morgan chose not to present any claim against Harvest to the jury for determination.

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

Finally, in closing arguments, Plaintiff's counsel never even mentioned Harvest or Mr. Morgan's claim for negligent entrustment or vicarious liability. (Ex. 12, at 121:5-136:19.) Further, and perhaps the clearest example of Mr. Morgan's decision to abandon his claims against Harvest,

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Plaintiff's counsel ***explained to the jury, in closing, how to fill out the Special Verdict form***. His remarks on liability were ***limited exclusively to Mr. Lujan***:

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

(Id. at 124:20-125:6 (emphasis added).) Plaintiff's counsel also failed to mention Harvest or the claim alleged against Harvest in his rebuttal closing argument. (*Id.* at 157:13-161:10.)

E. Plaintiff's Motion for Entry of Judgment Against Harvest Was Denied By This Court.

On July 30, 2018, Mr. Morgan filed a Motion for Entry of Judgment seeking to apply the jury's verdict against Mr. Lujan against Harvest. On November 28, 2018, this Court entered an Order denying Mr. Morgan's Motion, finding that no claims against Harvest were ever presented to the jury for determination.

III. LEGAL ARGUMENT

A. Mr. Morgan Voluntarily Abandoned His Claim Against Harvest and Chose Note to Present Any Claim Against Harvest to the Jury for Determination.

The record in this case conclusively establishes that Mr. Morgan made a conscious choice and/or strategic decision to abandon his claim against Harvest at trial. Mr. Morgan never mentioned Harvest during the introductory remarks to the jury in which the Parties and expected witnesses were introduced to the jury. (Ex. 10, at 17:2-24, 25:7-26:3.) Mr. Morgan never mentioned Harvest to the jury during voir dire or examined prospective jurors about their feelings regarding corporate liability, negligent entrustment, or vicarious liability. (*Id*. at 33:2-93:22, 97:6-188:21, 191:7-268:12; Ex. 11, at 3:24-65:7, 67:4-110:22.) Mr. Morgan never mentioned Harvest, vicarious liability, negligent

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entrustment, or even corporate liability in his opening statement. (Ex. 11, at 126:7-145:17.) Mr. Morgan never offered a single piece of evidence or elicited any testimony from any witness which would prove the elements of either vicarious liability or negligent entrustment. Mr. Morgan never mentioned Harvest, vicarious liability, negligent entrustment, or corporate liability in his closing argument or rebuttal closing argument. (Ex. 12, at 121:4-136:19, 157:13-161:10.) Mr. Morgan failed to include questions relating to Harvest's liability or the apportionment of fault to Harvest in the Special Verdict form, despite requesting revisions to the damages question in the sample Special Verdict form proposed by the Court. (Ex. 12, at 116:11-23; *see also* Ex. 14.) Finally, Mr. Morgan failed to include a single jury instruction relating to vicarious liability, negligent entrustment, or corporate liability. (Ex. 13.)

Mr. Morgan employed the same strategy for litigating his claims in the first trial — he chose to focus solely on Mr. Lujan's liability for negligence. Harvest was not mentioned in the introductory remarks to the jurors, in voir dire, in opening statements, or in the examination of any witness. (Ex. 7, at 29:4-17, 36:24-37:25, 41:1-21, 45:25-121:20, 124:13-316:24; Ex. 9, at 6:4-29:1.) Thus, the record clearly demonstrates that Mr. Morgan abandoned his claim against Harvest — likely due to a lack of evidence.

Typically, when a party chooses to abandon his or her claims at trial, the claims are dismissed with prejudice by stipulation either before or after the trial. It is rare that a party fails to litigate his or her alleged claims against a party yet refuses to dismiss the claims and insists that the abandoned claims should be resolved in his or her favor. Because Mr. Morgan has not sought the voluntary dismissal of his claims, Harvest respectfully requests that this Court enter judgment in favor of Harvest and against Mr. Morgan on both the express claim for negligent entrustment and the implicitly alleged claim for vicarious liability. Mr. Morgan had the opportunity for the jury to render a decision on these claims and voluntarily and intentionally chose not to present them to the jury for determination; therefore, Mr. Morgan should not be given another bite at the apple.

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B. Based on the Evidence Presented at Trial, Harvest Is Entitled to Judgment in Its Favor as to Mr. Morgan's Claim for Either Negligent Entrustment or Vicarious Liability.

As the plaintiff, Mr. Morgan bore the burden of proving his claims against Harvest at trial. *Porter v. Sw. Christian Coll.*, 428 S.W.3d 377, 381 (Tex. App. 2014) ("A plaintiff pleading respondeat superior bears the burden of establishing that the employee acted within the course and scope of his employment."); *Montague v. AMN Healthcare, Inc.*, 168 Cal. Rptr. 3d 123, 126 (Cal. Ct. App. 2014) ("The plaintiff bears the burden of proving that the employee's tortious act was committed within the scope of his or her employment."); *Willis v. Manning*, 850 So. 2d 983, 987 (La. Ct. App. 2003) (recognizing that the plaintiff bears the burden of proof on a claim for negligent entrustment); *Dukes v. McGimsey*, 500 S.W.2d 448, 451 (Tenn. Ct. App. 1973) ("The plaintiff has the burden of proving negligent entrustment of an automobile.") However, Mr. Morgan failed to offer any evidence in support of these claims — primarily, evidence that Mr. Lujan was acting in the course and scope of his employment at the time of the accident, or evidence that Harvest knew or reasonably should of known that Mr. Lujan was an inexperienced, incompetent, and/or reckless driver.

Not only did Mr. Morgan fail to prove his claim, but the evidence adduced at trial actually demonstrated that Harvest could not, as a matter of law, be liable for either vicarious liability or negligent entrustment. Specifically, the ***undisputed evidence*** offered at trial proved that Mr. Lujan was at lunch at the time of the accident and had never been in an accident before. (Ex. 3, at 168:15-23; Ex. 6, at 196:19-24, 197:8-10.) Based on such unrefuted evidence, judgment should be entered in favor of Harvest.

J&C Drilling Co. v. Salaiz, 866 S.W.2d 632 (Tex. App. 1993), is instructive on this issue:

> We reject appellees' contention that the issue of course and scope was not contested. Appellants' answer contained a general denial, which put in issue all of the allegations of appellees' petition, including the allegation that Gonzalez was acting in the course and scope of his employment with J&C. Because appellees had the burden of proof on this issue, it was not necessary for appellants to present evidence negating course and scope in order to contest the issue. In any event, as is discussed below, evidence was presented that Gonzalez was

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> on a personal errand at the time of the accident, refuting the allegation that he was acting in the course and scope of his employment.

(*Id.* at 635).

1. Mr. Morgan Did Not Prove a Claim for Vicarious Liability, and Based on the Sole Evidence Offered at Trial Relating to This Claim, Judgment Should Be Entered in Favor of Harvest.

While Mr. Morgan's Complaint states one claim for relief against Harvest entitled "Vicarious Liability/Respondeat Superior," the allegations contained therein do not actually reflect a theory of respondeat superior — i.e., that Mr. Lujan was acting within the course and scope of his employment with Harvest at the time of the accident. (*See* Ex. 1 at ¶¶ 15-22.) Rather, his claim was akin to a claim for negligent entrustment, alleging that: (1) Mr. Lujan was employed as a driver for Harvest; (2) Harvest entrusted him with the vehicle; (3) Mr. Lujan was an incompetent, inexperienced, and/or reckless driver; and (4) Harvest actually knew, or should have known, of Mr. Lujan's inexperience or incompetence. (*See id.*)

Even assuming *arguendo* that Mr. Morgan alleged a claim for vicarious liability, he failed to prove this claim at trial. Vicarious liability and/or respondeat superior applies to an employer only 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, 1225-26, 925 P.2d 1175, 1179, 1180-81 (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 the very task assigned to him'") (quoting *Prell Hotel Corp. v. Antonacci*, 86 Nev. 390, 391, 469 P.2d 399, 400 (1970)).

Mr. Morgan failed to offer any evidence as to Mr. Lujan's status at the time of the accident. The *only* facts adduced at trial that are related to Mr. Lujan's employment were: (1) that Mr. Lujan was an employee of Montara Meadows (a bus driver); (2) that Mr. Lujan drove the bus to Paradise Park for a lunch break; (3) that the accident occurred as Mr. Lujan was exiting the park; and (3) that Harvest is the "corporate office" of Montara Meadows. (*See* Ex. 3, at 168:15-23; Ex. 6, at 195:8-17, 195:25-196:10.)

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Mr. Morgan failed to establish whether Mr. Lujan was "on the clock" during his lunch break, whether Mr. Lujan had returned to work and was transporting passengers at the time of the accident, whether Mr. Lujan had to "clock in" after his lunch break, whether Mr. Lujan was permitted to use a company vehicle while on his lunch break, or whether Harvest Management even knew that Mr. Lujan was using a company vehicle during his lunch breaks. Without developing these facts, there is insufficient evidence, under Nevada law, to conclude that Mr. Lujan was acting in the course and scope of his employment at the time of the accident.

Moreover, the evidence offered by Mr. Lujan and Harvest demonstrates that Harvest is not vicariously liable for Mr. Morgan's injuries. Nevada has adopted the "going and coming rule." Under this rule, "[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." *Molino v. Asher*, 96 Nev. 814, 817-18, 618 P.2d 878, 879-80 (1980); *see also Nat'l Convenience Stores, Inc. v. Fantauzzi*, 94 Nev. 655, 658, 584 P.2d 689, 691 (1978). The rule is premised upon the idea that the "'employment relationship is "suspended" from the time the employee leaves until he returns, or that in commuting, he is not rendering service to his employer.'" *Tryer v. Ojai Valley Sch.*, 12 Cal. Rptr. 2d 114, 116 (Cal. Ct. App. 1992) (quoting *Hinman v. Westinghouse Elec. Co.*, 471 P.2d 988, 990-91 (Cal. 1970)).

While the Nevada Supreme Court has not specifically addressed whether an employer is vicariously liable for an employee's actions during a lunch break, the express language of and policy behind the "going and coming rule" suggests that an employee is not acting within the course and scope of his employment when he commutes to and from lunch during a break from his employment. Moreover, other jurisdictions have routinely determined that employers ***are not liable for an employee's negligence during a lunch break***. *See e.g., Gant v. Dumas Glass & Mirror, Inc.*, 935 S.W. 2d 202, 212 (Tex. App. 1996) (holding that an employer was not liable under respondeat superior when its employee rear-ended the plaintiff while driving back from his lunch break in a company vehicle because the test is not whether the employee is returning from his personal undertaking to "***possibly*** engage in work" but rather whether the employee ***has*** "returned to the zone of his employment" and engaged in the employer's business); *Richardson v. Glass*, 835 P.2d 835,

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838 (N.M. 1992) (finding the employer was not vicariously liable for the employee's accident during his lunch break because there was no evidence of the employer's control over the employee at the time of the accident); *Gordon v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 411 So. 2d 1094, 1098 (La. Ct. App. 1982) ("Ordinarily, an employee who leaves his employer's premises and takes his noon hour meal at home or some other place of his own choosing is outside the course of his employment from the time he leaves the work premises until he returns.").

Because Mr. Morgan failed to offer any evidence proving that Mr. Lujan was acting within the course and scope of his employment at the time of the accident — and the only evidence regarding Mr. Lujan's actions at the time of the accident demonstrate that he was on a lunch break — as a matter of law, Mr. Morgan's implicit claim for vicarious liability should be dismissed with prejudice and judgment should be entered in favor of Harvest.

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2. Mr. Morgan Also Failed to Prove to the Jury That Harvest Is Liable for Negligent Entrustment.

In Nevada, "a person who knowingly entrusts a vehicle to an inexperienced or incompetent person" may be found liable for damages resulting therefrom. *Zugel by Zugel v. Miller*, 100 Nev. 525, 527, 688 P.2d 310, 312 (1984). To establish negligent entrustment, a plaintiff must demonstrate: (1) that an entrustment actually occurred; and (2) that the entrustment was negligent. *Id*. at 528, 688 P.2d at 313.

Harvest conceded that Mr. Lujan was its employee and that it entrusted him with a vehicle — satisfying the first element of a negligent entrustment claim; however, the second element was contested and never proven to a jury. (Ex. 2, at 3:9-10.) Mr. Morgan offered no evidence of Harvest's negligence in entrusting Mr. Lujan with a company vehicle. He adduced no evidence that Mr. Lujan was an inexperienced or incompetent driver. In fact, the only evidence in the record relating to Mr. Lujan's driving history demonstrates that ***he has never been in an accident before***. (*See* Ex. 6, at 196:19-24; 197:8-10).

Mr. Morgan also failed to offer any evidence regarding Harvest's knowledge of Mr. Lujan's driving history. This is likely because Harvest's interrogatory responses demonstrated early in the

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case that it thoroughly checked Mr. Lujan's background prior to hiring him, and Harvest's annual check of Mr. Lujan's motor vehicle record "always came back clear." (Ex. 5, at 3:2-19.)

Based on the failure of evidence offered by Mr. Morgan, and Mr. Lujan's undisputed testimony regarding his lack of prior car accidents, as a matter of law, Mr. Morgan's express claim for negligent entrustment should be dismissed with prejudice and judgment should be entered in favor of Harvest.

IV. CONCLUSION

For the foregoing reasons, Harvest requests that the Court enter judgment in its favor as to Mr. Morgan's claim for negligent entrustment (or vicarious liability). A proposed Judgment is attached hereto as Exhibit A.

DATED this 21st day of December, 2018.

BAILEY❖KENNEDY

By: */s/ Dennis L. Kennedy*
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SARAH E. HARMON
JOSHUA P. GILMORE
ANDREA M. CHAMPION

Attorneys for Defendant
HARVEST MANAGEMENT SUB LLC

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CERTIFICATE OF SERVICE

I certify that I am an employee of BAILEY❖KENNEDY and that on the 21st day of December, 2018, service of the foregoing **DEFENDANT HARVEST MANAGEMENT SUB LLC'S MOTION FOR ENTRY OF JUDGMENT** was made by mandatory electronic service through the Eighth Judicial District Court's electronic filing system to the following:

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EXHIBIT A

JUDG
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HARVEST MANAGEMENT SUB LLC

DISTRICT COURT

CLARK COUNTY, NEVADA

AARON M. MORGAN, individually, Plaintiff, vs. DAVID E. LUJAN, individually; HARVEST MANAGEMENT SUB LLC; a Foreign-Limited-Liability Company; DOES 1 through 20; ROE BUSINESS ENTITIES 1 through 20, inclusive jointly and severally, Defendants.	Case No. A-15-718679-C Dept. No. XI

PROPOSED JUDGMENT

On _____ ____, 2019, this matter came on for a duly-noticed hearing before the Honorable Elizabeth Gonzalez concerning Defendant Harvest Management Sub LLC's ("Harvest") Motion for Entry of Judgment. Having duly considered the pleadings and papers on file and the argument of counsel, and good cause appearing therefore; the Court makes the following Findings of Fact and Conclusions of Law and Judgment:

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FINDINGS OF FACT

1. On April 1, 2014, Defendant David E. Lujan ("Mr. Lujan"), an employee of Harvest, was involved in a car accident with Plaintiff Aaron M. Morgan ("Mr. Morgan").

2. Mr. Lujan was driving a passenger bus owned by Harvest at the time of the accident.

3. On May 20, 2015, Mr. Morgan filed a Complaint against Harvest and Mr. Lujan for injuries and damages arising from the car accident.

4. In the Complaint, Mr. Morgan alleged a claim for negligent entrustment and/or vicarious liability against Harvest.

5. Mr. Morgan's claims against Mr. Lujan and Harvest were tried before a jury from April 2, 2018 to April 9, 2018.

6. During the jury trial, Mr. Morgan failed to offer any evidence to demonstrate that Mr. Lujan was granted permission to drive the passenger bus and was acting within the course and scope of his employment at the time of the accident

7. During the jury trial, Mr. Morgan failed to offer any evidence to demonstrate that Harvest knew, or reasonably should have known, that Mr. Lujan was an incompetent, inexperienced, negligent, and/or reckless driver.

8. During the jury trial, Mr. Lujan and Harvest offered evidence to demonstrate that Mr. Lujan was on his lunch break at the time of the accident. Mr. Morgan did not dispute this evidence.

9. During the jury trial, Mr. Lujan and Harvest offered evidence to demonstrate that Mr. Lujan had never been in a car accident prior to the accident with Mr. Morgan. Mr. Morgan did not dispute this evidence.

10. The jury did not enter a verdict against Harvest on any of Morgan's claims for relief.

CONCLUSIONS OF LAW

1. The elements of a claim for negligent entrustment are: (1) that an entrustment actually occurred; and (2) that the entrustment was negligent. *Zugel by Zugel v. Miller*, 100 Nev. 525, 528, 688 P.2d 310, 313 (1984).

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2. "A person who knowingly entrusts a vehicle to an inexperienced or incompetent person" may be found liable for damages resulting from negligent entrustment. *Id.* at 527, 688 P.2d at 312.

3. As the Plaintiff, Mr. Morgan bore the burden of proof regarding his claim for negligent entrustment. *Willis v. Manning*, 850 So. 2d 983, 987 (La. Ct. App. 2003); *Dukes v. McGimsey*, 500 S.W. 2d 448, 451 (Tenn. Ct. App. 1973).

4. Mr. Morgan offered no evidence to demonstrate that Mr. Lujan was an inexperienced or incompetent driver; therefore, he failed to satisfy his burden of proof regarding the essential elements of a claim for negligent entrustment.

5. Based on the undisputed evidence offered at trial, that Mr. Lujan had never been in a car accident prior to the accident with Mr. Morgan, Harvest did not and could not have known that Mr. Lujan was an incompetent or inexperienced driver.

6. Therefore, Harvest is not liable for negligent entrustment of its vehicle to Mr. Lujan, and Mr. Morgan's claim for negligent entrustment is dismissed with prejudice.

7. To the extent that Mr. Morgan alleged a claim for vicarious liability against Harvest, the elements of a claim for vicarious liability are: (1) that the actor at issue was an employee of the defendant; and (2) that 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, 925 P.2d 1175, 1179 (1996). An employer is not liable for an employee's independent ventures. *Id.* at 1225-26, 925 P.2d at 1180-81.

8. As the Plaintiff, Mr. Morgan bore the burden of proof regarding his claim for vicarious liability. *Porter v. Sw. Christian Coll.*, 428 S.W.3d 377, 381 (Tex. App. 2014); *Montague v. AMN Healthcare, Inc.*, 168 Cal. Rptr. 3d 123, 126 (Cal. Ct. App. 2014).

9. Mr. Morgan offered no evidence to demonstrate that Mr. Lujan had been granted permission to driver the passenger bus and was acting within the course and scope of his employment with Harvest at the time of the accident; therefore, he failed to satisfy his burden of proof regarding the essential elements of a claim for vicarious liability.

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10. Based on the undisputed evidence offered at trial that Mr. Lujan was on his lunch break at the time of the accident, Mr. Lujan could not have been acting within the course and scope of his employment when the accident occurred.

11. Nevada has adopted the "going and coming rule," which holds 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." *Molino v. Asher*, 96 Nev. 814, 817-18, 618 P.2d 878, 879-80 (1980); *Nat'l Convenience Stores, Inc. v. Fantauzzi*, 94 Nev. 655, 658, 584 P.2d 689, 691 (1978).

12. While Nevada has not yet specifically addressed an employer's vicarious liability for an employee's actions during his lunch break, based on the rationale and purpose of the "going and coming rule, it is clear that an employee is not acting within the course and scope of his or her employment while the employee is on a lunch break. *See e.g.*, *Gant v. Dumas Glass & Mirror, Inc.*, 935 S.W. 2d 202, 212 (Tex. App. 1996); *Richardson v. Glass*, 835 P.2d 835, 838 (N.M. 1992); *Gordon v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 411 So. 2d 1094, 1098 (La. Ct. App. 1982).

13. Therefore, based on the undisputed evidence offered at trial, Harvest is not vicariously liable for Mr. Morgan's injuries, and Mr. Morgan's claim for vicarious liability is dismissed with prejudice.

14. As a matter of law, Mr. Morgan failed to prove that Harvest was liable in any manner for Mr. Morgan's injuries and/or damages.

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JUDGMENT

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that, after a trial on the merits, any and all claims which were alleged or could have been alleged by Mr. Morgan in this action are dismissed with prejudice and judgment is entered in favor of Harvest and against Mr. Morgan on these claims. Mr. Morgan shall recover nothing hereby.

IT IS SO ORDERED this ___ day of _____, 2019.

_____
HONORABLE ELIZABETH GONZALEZ
DISTRICT COURT JUDGE

Respectfully submitted by:
BAILEY❖KENNEDY

By: _____
DENNIS L. KENNEDY
SARAH E. HARMON
JOSHUA P. GILMORE
ANDREA M. CHAMPION

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EXHIBIT 10

EXHIBIT 10

DAO

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

AARON M. MORGAN, INDIVIDUALLY,

Plaintiff,

vs.

DAVID E. LUJAN, individually, HARVEST MANAGEMENT SUB LLC; a Foreign-Limited Liability Company; DOES 1 THROUGH 20; ROE BUSINESS ENTITIES 1 THROUGH 20, inclusive Jointly and Severally,

Defendants.

Case No. A-15-718679-C

Dept. No. VII

DECISION AND ORDER

Defendant Harvest Management Sub LLC filed a Motion for Entry of Judgment because Aaron Morgan failed to properly pursue his claim of vicarious liability against them and abandoned his claim. This Motion followed a similar Motion for Entry of Judgment filed by Mr. Morgan that Judge Gonzalez denied. Mr. Morgan filed a Motion for Attorney Fees and Costs, arguing Harvest should pay attorney fees as a result of Harvest causing a mistrial. Upon review of the Motions, Oppositions, and Replies, as well as in consideration of the points made in oral argument, I find that I am without jurisdiction to render a decision on the Motion for Entry of Judgment and will stay proceedings until the appeal pending is resolved. I certify that should the Supreme Court remand the case back to me, I will recall the jury and instruct them to consider whether their verdict applied to Harvest. For the fees, I find that it would be a waste of judicial economy to rule on the fees at this point, and will defer judgment until the Supreme Court makes its decision.

I. Factual and Procedural Background

This case involves a car accident in which David Lujan, a driver for Harvest, struck Mr. Morgan. Mr. Morgan sustained injuries as a result of this accident. Mr. Morgan filed a Complaint on May 05, 2015. Mr. Morgan levied several causes of action against the Defendants. Mr. Morgan claimed negligence and negligence per se against David Lujan and vicarious liability/respondeat

LINDA MARIE BELL
DISTRICT JUDGE
DEPARTMENT VII

superior against Harvest. Mr. Morgan claimed that Mr. Lujan was acting in the scope of his employment with Harvest when he caused an accident to occur, injuring Mr. Morgan.

On June 16, 2015, the Defendants filed an Answer to Mr. Morgan's Complaint. The Answer denied the allegation that Mr. Lujan was acting in the course and scope of his employment at the time of the accident. Harvest further denied that Mr. Lujan was incompetent, inexperience, or reckless in the operation of the vehicle, that Harvest knew or should have known Mr. Lujan was incompetent, inexperienced, or reckless in the operation of the vehicle, that Mr. Morgan was injured as a proximate cause of Harvest's negligent entrustment of the vehicle to Mr. Lujan, and that Mr. Morgan suffered damages as a direct and proximate result of Harvest's negligent entrustment. Defendants were represented by Douglas J. Gardner, Esq. of Rands, South, & Gardner who represented both Defendants throughout the discovery process.

On April 24, 2017, the parties appeared for a jury trial. The Defendant advised me that Mr. Lujan had been hospitalized. I continued this jury trial. On November 6, 2017, the parties conducted a second jury trial. This trial ended in a mistrial as a result of the Defendants inquiring about the pending DUI charge against Mr. Morgan. On April 2, 2018, the parties held the second trial. During this trial, the parties failed to provide a verdict form. Instead, the parties agreed to use a verdict form that had been used in a prior trial and was modified by my assistant. I did not catch, nor did any of the four attorneys, that the verdict form inadvertently omitted Harvest from the caption. The form also designated a singular "Defendant" instead of referring to multiple Defendants. Using this flawed form, the jury awarded Mr. Morgan $2,980,000.00 in damages. I did not make any legal determination regarding Harvest. I also do not recall Harvest contesting vicarious liability during any of the three trials or during the two years proceeding.

On July 30, 2018, Mr. Morgan filed a Motion for Entry of Judgment requesting the Court enter a written judgment against both Lujan and Harvest Management. The Court ruled that the inconsistencies in the jury instructions and the special verdict form were not enough to support judgment against Harvest. Mr. Morgan appealed on December 18, 2018. This matter is currently pending before the Nevada Supreme Court.

LINDA MARIE BELL
DISTRICT JUDGE
DEPARTMENT VII

On December 21, 2019, Harvest filed a Motion for Entry of Judgment based on the decision made on Mr. Morgan's Motion for Entry of Judgment. Harvest argues that this decision warrants an immediate judgment in its favor. Mr. Morgan filed an opposition and Countermotion on January 15, 2019. Harvest filed a Reply on January 23, 2019. I heard oral arguments on March 05, 2019.

Mr. Morgan filed a Motion for Attorney's Fees and Costs on January 22, 2019. Harvest filed an Opposition on February 22, 2019. Mr. Morgan filed a Reply on March 08, 2019. I heard oral arguments on March 19, 2019.

II. Discussion

Harvest makes the following arguments in support of its Motion:

(1) Mr. Morgan voluntarily abandoned his claim against Harvest and did not present any claims against Harvest to the jury for determination.

(2) Harvest is entitled to judgment in its favor as to Mr. Morgan's claim for either negligent entrustment or vicarious liability.

Before I can address these arguments, I must first address whether I have jurisdiction to hear this case. The pending appeal by Mr. Morgan may affect my ability to adjudicate this matter.

A. The pending appeal by Mr. Morgan divests this Court of jurisdiction.

The Supreme Court of Nevada held that a "timely notice of appeal divests the district court of jurisdiction" to address issues pending before the Nevada Supreme Court. Mack-Manley v. Manley, 122 Nev. 849, 855-56, 138 P.3d 525, 530 (2006). I may only adjudicate "matters that are collateral to and independent from the appealed order, i.e., matters that in no way affect the appeal's merits." Id. at 855.

Mr. Morgan argues that the pending appeal divests this Court of jurisdiction to hear matters related to the Order Denying Mr. Morgan's Motion for Entry of Judgment, the Jury Verdict, or related substantive issues. Harvest argues that the Order denying the Motion for Entry of Judgment is not a final order because there is an issue remaining against Harvest. Harvest concludes that if the Order denying the motion for Entry of Judgment is not a final order, the Supreme Court does not have jurisdiction.

The Supreme Court could find that Mr. Morgan's appeal has merit and may reverse the Order granting the Motion for Entry of Judgment. This would grant Mr. Morgan a judgment against Harvest and render Harvest's current Motion moot. Thus, this Motion is not collateral and independent. This Motion directly stems from Judge Gonzalez denying Mr. Morgan's Motion for Entry of Judgment.

Substantively, I agree with Harvest that the flawed verdict form used at trial does not support a verdict against Harvest. Pursuant to Huneycutt v. Huneycutt, I certify that if this case was remanded, I would recall the jury from the subject trial and instruct them to consider whether their verdict applied to Harvest. 94 Nev. 79, 575 P.2d 585 (1978).

B. As the pending Supreme Court decision impacts liability, I am deferring judgment until the resolution of the appeal on the Motion for attorney fees.

I have jurisdiction to resolve attorney fees. I find that it is against the interest of judicial economy to resolve the issue at this time. Mr. Morgan seeks $47,250.00 in fees and $20,371.40 in costs for the mistrial. Mr. Morgan also seeks $42,070.75 for costs incurred in the completed jury trial. While the pending Supreme Court decision does not directly consider these pending fees and costs, the decision will impact who could be responsible for some of these fees and costs. In addition, the parties seemed to indicate that, depending on the Supreme Court decision, further Motions for Attorney Fees could be warranted. Judicial economy would best be served if all requests for fees and costs were handled at the same time after all variables are accounted for.

LINDA MARIE BELL
DISTRICT JUDGE
DEPARTMENT VII

III. Conclusion

The current Motion in front of me directly relates to the appeal pending before the Supreme Court. I am without jurisdiction to adjudicate this matter. I am staying proceedings until the appeal is resolved and certify that if this were remanded back to me, I would recall the jury and instruct them to consider whether Harvest is liable. I am also deferring judgment on attorney fees and costs. The parties may place this back on calendar when the Nevada Supreme Court renders its opinion.

DATED this 2 day of April, 2019.

LINDA MARIE BELL
DISTRICT COURT JUDGE

LINDA MARIE BELL
DISTRICT JUDGE
DEPARTMENT VII

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the date of filing, a copy of this Order was electronically served through the Eighth Judicial District Court EFP system or, if no e-mail was provided, by facsimile, U.S. Mail and/or placed in the Clerk's Office attorney folder(s) for:

Name	Party
Micah S. Echols Marquis Aurbach Coffing Attn: Micah Echols 10001 Park Run Drive Las Vegas, NV 89145	Counsel for Plaintiff
Dennis L. Kennedy Bailey * Kennedy c/o Dennis L. Kennedy 8984 Spanish Ridge Avenue Las Vegas, NV 89148	Counsel for Harvest Management Sub LLC
Douglas J. Gardner 1055 Whitney Ranch Dr., Suite 220 Henderson, NV 89014	Counsel for David Lujan

SYLVIA PERRY
JUDICIAL EXECUTIVE ASSISTANT, DEPARTMENT VII

AFFIRMATION

Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding Decision and Order filed in District Court case number A718679 **DOES NOT** contain the social security number of any person.

/s/ Linda Marie Bell
District Court Judge

Date: ~~03/7/2019~~ 4/2/19

LINDA MARIE BELL
DISTRICT JUDGE
DEPARTMENT VII

EXHIBIT 11

EXHIBIT 11

IN THE SUPREME COURT OF THE STATE OF NEVADA

HARVEST MANAGEMENT SUB LLC,
Petitioner,
vs.
THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE LINDA MARIE BELL,
Respondents,
and
AARON M. MORGAN; AND DAVID E. LUJAN,
Real Parties in Interest.

No. 78596

ORDER DENYING PETITION FOR WRIT OF MANDAMUS

This original petition for a writ of mandamus challenges a district court order denying a motion for entry of judgment.

Having considered the petition and supporting documentation, we are not persuaded that our extraordinary and discretionary intervention is warranted at this time. *Pan v. Eighth Judicial Dist. Court*, 120 Nev. 222, 228, 88 P.3d 840, 844 (2004) (observing that the party seeking writ relief bears the burden of showing such relief is warranted); *Smith v. Eighth Judicial Dist. Court*, 107 Nev. 674, 677, 679, 818 P.2d 849, 851, 853 (1991) (recognizing that writ relief is an extraordinary remedy and that this court has sole discretion in determining whether to entertain a writ petition). Accordingly, we deny petitioner's request for writ relief. We clarify that this denial is without prejudice to petitioner's ability to seek writ relief again if subsequent steps are taken to reconvene the jury. *Cf. Sierra Foods v. Williams*, 107 Nev. 574, 576, 816 P.2d 466, 467 (1991) ("[T]he general rule

in many jurisdictions is that a trial court is without authority or jurisdiction to reconvene a jury once it has been dismissed . . . .").

It is so ORDERED.

_____, C.J.
Gibbons

_____, J.
Stiglich

_____, J.
Silver

cc: Hon. Linda Marie Bell, Chief Judge
Bailey Kennedy
Richard Harris Law Firm
Rands & South & Gardner/Reno
Rands, South & Gardner/Henderson
Marquis Aurbach Coffing
Eighth District Court Clerk

EXHIBIT 12

EXHIBIT 12

IN THE SUPREME COURT OF THE STATE OF NEVADA

AARON M. MORGAN, an individual, Appellant, vs. DAVID E. LUJAN, an individual, and HARVEST MANAGEMENT SUB LLC, a foreign limited-liability company, Respondents.	Case No.: 77753 Appeal from the Eighth Judicial District Court, the Honorable Elizabeth Gonzalez Presiding

MOTION FOR REMAND PURSUANT TO NRAP 12A

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I. INTRODUCTION

For over four years, Plaintiff / Appellant Aaron Morgan ("Morgan") litigated negligence-based claims against David Lujan ("Lujan") and his employer, Harvest Management Sub LLC ("Harvest Management"). During this time period, all parties understood that Morgan's claims centered on Lujan's failure to act with reasonable care while driving a bus in the course of his employment and Harvest Management's liability as Lujan's employer. But, because the District Court inadvertently listed only Lujan on the jury verdict form, there are now questions as to whether the jury intended to find *both* Defendants 100% at fault and liable for Morgan's injuries.

The District Court certified its intention to resolve this issue by recalling the jury.[1] Although Morgan believes NRCP 49(a) is a better option for resolving the issue with the verdict form, there is indisputably more work to be done in the District Court. Accordingly, the instant motion asks this Court for a remand pursuant to NRAP 12A.

[1] *See* Decision and Order, attached hereto as **Exhibit 1**.

II. RELEVANT FACTS AND PROCEDURAL HISTORY

On April 1, 2014, Morgan sustained serious, life-altering injuries when a Montara Meadows[2] shuttle bus pulled in front of his moving vehicle. Morgan then filed a complaint in which he asserted three causes of action: (1) negligence against the driver of the shuttle bus, Lujan; (2) negligence per se against Lujan premised on his failure to obey traffic laws; and (3) vicarious liability / respondeat superior against Harvest Management based on its ownership of the shuttle bus and employment of Lujan. The Defendants then jointly answered the complaint and the case progressed in the ordinary course before the Honorable Judge Bell.

Following a Defense-induced mistrial in November 2017, the case proceeded to a second trial in April 2018. On the final day of trial, the District Court sua sponte created a special verdict form that listed Lujan as the only Defendant.[3] The District Court noted the error when showing a draft of the form to counsel, and 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.
>
> [Defense counsel]: Yeah. That looks fine.

[2] Montara Meadows is a senior citizen community in Las Vegas which is under the purview of Harvest Management.

[3] A copy of the special verdict form is attached hereto as **Exhibit 2**.

> 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.
>
> (Emphasis added).[4]

Unfortunately, the verdict form was not corrected before it went to the jury.[5] So, while the jury received written instructions with a complete, proper caption,[6] their finding that Defendant[s] were 100% at fault for the accident and the corresponding award of $2,980,000 was written on an improperly-captioned special verdict form.

On June 29, 2018, the District Court filed a Civil Order to Statistically Close Case in which the box labeled "Jury – Verdict Reached" was checked. The following Monday, when Judge Bell assumed the role of Chief Judge in the Eighth Judicial District Court, the case was reassigned to the Honorable Judge Gonzalez as part of a mass reassignment of cases that came with the new fiscal year. *See* Eighth Judicial District Court Administrative Order 18-05.

On July 30, 2018, Morgan filed a Motion for Entry of Judgment in which he asked Judge Gonzalez to enter a written judgment against both Defendants. Given the issue with the verdict form, this motion also included an alternative request for

[4] The relevant portion of the trial transcript is attached hereto as **Exhibit 3**.

[5] *See* Exhibit 2.

[6] *See* Jury Instructions cover page, attached as **Exhibit 4**.

the Court to make an explicit finding in accordance with NRCP 49(a) that the jury's special verdict was rendered against Lujan *and* Harvest Management. In support of the motion, Morgan explained how the issue of vicarious liability / respondeat superior was tried by consent. Further, Morgan highlighted portions of the record which confirmed that Morgan pursued claims against both Defendants. Finally, because NRCP 49(a) is fact-intensive, Morgan also argued that the case should be transferred back to Judge Bell. After briefing and a hearing, Judge Gonzalez denied the motion and entered judgment as to only Lujan.

On December 18, 2018, Morgan filed the notice of appeal which led to this case. As explained in his docketing statement, the issues on appeal center on Judge Gonzalez's determination that the jury's verdict pertained to only one of the Defendants. Morgan's appeal also implicates *Hornwood v. Smith's Food King No. 1*, 105 Nev. 188, 191, 772 P.2d 1284, 1286 (1989), because Judge Gonzalez rejected the argument that Judge Bell, the jurist who presided over every aspect of the case, including both trials, would be better equipped to address irregularities in the verdict form.

After Morgan filed his notice of appeal, Harvest Management filed its own Motion for Entry of Judgment. Morgan timely opposed the motion and counter-

moved to return the case to Judge Bell. Over Harvest Management's objection, the case was reassigned back to Judge Bell.

Following two hearings regarding Harvest's Motion for Entry of Judgment and other post-trial matters, Judge Bell concluded that she lacked jurisdiction to hear non-collateral matters because of Morgan's pending appeal in this Court.[7] So, while Judge Bell agreed that the flawed verdict form necessitated further action, Judge Bell certified her decision pursuant to *Huneycutt v. Huneycutt*, 94 Nev. 79, 575 P.2d 585 (1978), so the parties could request a remand from this Court.[8]

Oddly, Harvest Management filed a Petition for Writ Relief instead of a motion for *Huneycutt* relief.[9] Because a *Huneycutt* / NRAP 12A remand is the correct procedure to address residual issues, Morgan now requests a remand and, hopefully, this Court's guidance.

III. LEGAL ARGUMENT

"The point at which jurisdiction is transferred must [ ] be sharply delineated." *Rust v. Clark Cnty. Sch. Dist.*, 103 Nev. 686, 688-89, 747 P.2d 1380, 1382 (1987). To this end, this Court's decisions have repeatedly held that "a

[7] *See* Decision and Order filed April 5, 2019, attached hereto as Exhibit 1.

[8] *Id.* at pages 3-4.

[9] Harvest Management's Petition was assigned Supreme Court Case No. 78596. Harvest Management's Petition was denied on May 15, 2019.

timely notice of appeal divests the district court of jurisdiction" to "revisit issues that are pending before [the Supreme Court]." *Mack-Manley v. Manley*, 122 Nev. 849, 855-56, 138 P.3d 525, 530 (2006); *see also Foster v. Dingwall*, 126 Nev. 49, 52, 228 P.3d 453, 455, 2010 WL 1407139 (2010).[10] Stated inversely, once a notice of appeal has been filed, district courts are limited to entering orders "on matters that are collateral to and independent from the appealed order, *i.e.*, matters that in no way affect the appeal's merits." *Mack-Manley*, 122 Nev. at 855, 138 P.3d at 530.

In this case, the District Court correctly recognized that it lacked jurisdiction to hear or adjudicate "matters related to the Order Denying Mr. Morgan's Motion for Entry of Judgment, the Jury Verdict, or related substantive issues."[11] There are at least two viable options for resolving this quandary. One, the District Court may follow through on its plan to "recall the jury from the subject trial and instruct them to consider whether their verdict applied to Harvest."[12] Two, the District Court could make an explicit finding pursuant to NRCP 49(a) that the special

[10] Because the Supreme Court of Nevada issued two opinions in *Foster v. Dingwall*, the Westlaw citation is provided for the sake of clarity and should not be misinterpreted as a citation to an unpublished decision.

[11] Decision and Order, Exhibit 1, at page 3.

[12] Decision and Order, Exhibit 1, at page 4.

verdict was rendered against both Defendants. Although Morgan submits that the second separate option is better,[13] the fact remains that neither option is available without a remand from this Court.

Under NRAP 12A, remand is available after an indicative ruling in which the District Court states its intent to grant relief on a substantial issue. NRAP 12A thus codifies this Court's established *Huneycutt* procedure.

Here, a remand pursuant to NRAP 12A would allow the District Court to resolve the outstanding uncertainty as to Harvest Management. Accordingly, remand also would prevent piecemeal litigation and save judicial resources. After all, while the post-trial proceedings have been an unmitigated mess, the essential issue remains whether Harvest Management should be liable for Morgan's injuries.[14] There is thus no reason to burden this Court (or the District Court) with multiple cases which stem from the same record. And, on a related note, participation in this Court's NRAP 16 program would be more productive if all the parties knew which Defendant(s) were liable for Morgan's damages.

[13] The very purpose of NRCP 49(a) is to address unresolved issues of facts which were raised by the pleadings or the evidence. By allowing district courts to make their own findings, the Rule thus allows for an alternative to the drastic step of recalling a jury months or years after a trial.

[14] Because Lujan did not file a timely appeal, his liability is not in dispute.

IV. CONCLUSION

The problems with the jury verdict form are not going away any time soon. Rather than litigating this issue in separate proceedings, the most efficient option is a remand to the District Court, preferably with instructions encouraging the District Court to consider NRCP 49(a). Therefore, Morgan respectfully urges this Court to grant the instant Motion to Remand so the District Court may resolve Harvest Management's Motion for Entry of Judgment and other related, post-trial issues, including Morgan's own Motion for Entry of Judgment, which the District Court has reopened.

Dated this 15th day of May, 2019.

Marquis Aurbach Coffing

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CERTIFICATE OF SERVICE

I hereby certify that **MOTION TO REMAND PURSUANT TO NRAP 12A** was filed electronically with the Nevada Supreme Court on the 15th day of May, 2019. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

Douglas Gardner
Joshua Gilmore
Andrea Champion
Dennis Kennedy
Sarah Harmon

I further certify that I served a copy of this document by mailing a true and correct copy thereof, postage prepaid, addressed to:

Ara H. Shirinian, Esq.
10651 Capesthorne Way
Las Vegas, NV 89135
Settlement Judge

/s/ Leah Dell
Leah Dell, an employee of
Marquis Aurbach Coffing

MAC:15167-001 3703042_1

EXHIBIT 13

EXHIBIT 13

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IN THE SUPREME COURT OF THE STATE OF NEVADA

AARON M. MORGAN, individually, Appellant, vs. DAVID E. LUJAN, individually; and HARVEST MANAGEMENT SUB LLC, a foreign limited-liability company, Respondents.	Supreme Court No. 77753 District Court No. A-15-718679-C **RESPONDENT HARVEST MANAGEMENT SUB LLC'S OPPOSITION TO MOTION FOR REMAND PURSUANT TO NRAP 12A**

RESPONDENT HARVEST MANAGEMENT SUB LLC'S OPPOSITION TO MOTION FOR REMAND PURSUANT TO NRAP 12A

I. INTRODUCTION

Respondent Harvest Management Sub LLC ("Harvest") agrees that this appeal should be remanded (because this Court lacks jurisdiction over Appellant Aaron M. Morgan's ("Mr. Morgan") premature appeal); however, Harvest opposes Mr. Morgan's Motion to Remand Pursuant to NRAP 12A because it is procedurally improper and will only lead to more chaos and uncertainty in this case.

Mr. Morgan seeks remand on two grounds: (1) the district court's indicative ruling that it would reconvene jurors dismissed in April 2018, in order to determine Harvest's liability; or (2) Mr. Morgan's misplaced belief that NRCP 49(a) could be utilized to enter judgment against Harvest. Neither ground warrants remand. First, this Court has already issued an order strongly suggesting that a jury cannot be reconvened once it has been dismissed. Second, the district court has not even hinted, let alone issued an indicative ruling, that it would enter judgment against Harvest pursuant to NRCP 49(a). In fact, the district court has already ***denied*** such a motion by Mr. Morgan

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because Rule 49 is not an instrument for determining the ultimate issue of liability where a party has utterly failed to present a claim for the jury's determination. Mr. Morgan did not seek timely reconsideration of this decision; therefore, Mr. Morgan's Motion for Remand should be denied.

II. STATEMENT OF FACTS AND PROCEDURAL HISTORY

On May 20, 2015, Mr. Morgan filed a Complaint against Harvest and Respondent David E. Lujan ("Mr. Lujan"). (Ex. 1.[1]) Mr. Morgan alleged claims for negligence and negligence per se against Mr. Lujan, and a claim for negligent entrustment[2] against Harvest. (*Id.* at 3:1-4:12.) In April 2018, the case was tried to a jury, and the only claim presented to the jury for decision was the claim for negligence against Mr. Lujan. (Mot. for Remand, at Ex. 2.)

On July 30, 2018, Mr. Morgan filed a Motion for Entry of Judgment seeking to have the district court apply the jury's verdict against Mr. Lujan to Harvest, despite the fact that no claim for relief against Harvest was proven at

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[1] Compl. (May 20, 2015), attached as Exhibit 1.

[2] The claim against Harvest was erroneously titled "vicarious liability/ respondeat superior," but its allegations clearly state a claim for negligent entrustment.

trial or presented to the jury for determination. (Ex. 2,[3] at 3:2-4; Ex. 3,[4] at 14:15-20:11.) In the alternative, Mr. Morgan moved for entry of judgment against Harvest pursuant to NRCP 49(a). (Ex. 3, at 5:18-6:11.) On November 28, 2018, the district court denied Mr. Morgan's motion, holding that the failure to include the claim against Harvest in the Special Verdict form was not a mere "clerical error," that no claim against Harvest had been presented to the jury for determination, and that no judgment could be entered against Harvest based on the jury's verdict. (Ex. 4[5]; Ex. 5,[6] at 9:8-21.) Therefore, on January 2, 2019, a Judgment Upon the Jury Verdict was entered solely against Mr. Lujan. (Ex. 6.[7])

On December 18, 2018, Mr. Morgan filed a Notice of Appeal from the Order denying his Motion for Entry of Judgment and from the Judgment. (Ex.

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[3] Pl.'s Mot. for Entry of J. (July 30, 2018), attached as Exhibit 2. The exhibits to this motion have been omitted in the interest of judicial economy and efficiency.

[4] Def. Harvest Mgmt. Sub LLC's Opp'n to Pl.'s Mot. for Entry of J. (Aug. 16, 2018), attached as Exhibit 3. The Appendix of Exhibits to this motion have been omitted in the interest of judicial economy and efficiency.

[5] Notice of Entry of Order on Pl.'s Mot. for Entry of J. (Nov. 28, 2018), attached as Exhibit 4.

[6] Excerpts of Tr. of Hr'g on Pl.'s Mot. for Entry of J. (Jan. 18, 2019), attached as Exhibit 5.

[7] Notice of Entry of J. (Jan. 2, 2019), attached as Exhibit 6.

7.[8]) On December 21, 2018, Harvest filed a Motion for Entry of Judgment against Mr. Morgan as to his claim for relief against Harvest that he seemingly abandoned and/or failed to prove at trial. (Ex. 8.[9]) On April 5, 2019, the district court determined that it lacked jurisdiction to decide Harvest's Motion for Entry of Judgment and that it would stay proceedings pending resolution of Mr. Morgan's appeal. (Mot. for Remand, at Ex. 1, at 1:16-19, 5:1-4). The district court also rendered an indicative ruling, pursuant to *Huneycutt v. Huneycutt*, 94 Nev. 79, 575 P.2d 585 (1978), that if this Court remanded the case, it would "recall the jury and instruct them to consider whether their verdict applied to Harvest." (*Id*. at 1:19-21, 4:7-9, 5:4-5.) The indicative ruling does not mention NRCP 49.

On April 18, 2019, Harvest filed a Petition for Extraordinary Writ Relief, seeking a writ of mandamus ordering the district court to refrain from reconvening the jurors dismissed over a year ago, and ordering the district

[8] Notice of Appeal (Dec. 18, 2018), attached as Exhibit 7. The exhibits to the notice have been omitted in the interest of judicial economy and efficiency.

[9] Def. Harvest Mgmt. Sub LLC's Mot. for Entry of J. (Dec. 21, 2018), attached as Exhibit 8. The Appendix of Exhibits to the motion have been omitted in the interest of judicial economy and efficiency.

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court to enter judgment in favor of Harvest given the prior determination that the jury's verdict could not be entered against Harvest. (Ex. 9,[10] at 7:16-8:7.) On May 15, 2019, this Court denied the Writ Petition "without prejudice to petitioner's ability to seek writ relief again if subsequent steps are taken to reconvene the jury." (Ex. 10,[11] at 1.)

III. ARGUMENT

NRAP 12A provides that this Court has the discretion to remand an action to the district court where "a ***timely motion is made in the district court*** for relief that it lacks authority to grant because of an appeal . . ., if the district court states either that ***it would grant the motion*** or that the ***motion raises a substantial issue***." (Emphasis added). Here, Mr. Morgan's Motion for Entry of Judgment pursuant to NRCP 49(a) was ***denied*** by the district court[12] on

[10] Petition for Extraordinary Writ Relief (Apr. 18, 2019), attached as Exhibit 9. The Addendum and the Appendix to the Petition have been omitted in the interest of judicial economy and efficiency.

[11] Order Denying Petition for Writ of Mandamus (May 15, 2019), attached as Exhibit 10.

[12] Mr. Morgan asserts that his motion was denied because it was not heard by the trial judge, despite his request that the case be transferred back to the trial judge for determination. (Mot. for Remand, at 4.) This argument is patently false. ***Neither Mr. Morgan's Motion for Entry of Judgment nor the Reply brief in support of the same included a request for a transfer of the case to the trial judge.*** (*See* Ex. 2; Pl.'s Reply in Support of Mot. for Entry of J. (Sept. 7, 2018), attached as Exhibit 11 (the exhibits to the Reply have been

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November 28, 2018. (Ex. 2, Ex. 4.) Mr. Morgan never filed a motion for reconsideration (and certainly cannot do so at this late date[13]). Because the district court has not issued any indicative ruling regarding a renewed motion for entry of judgment pursuant to Rule 49(a), remand pursuant to NRAP 12A is improper.

The only indicative ruling rendered by the district court was its decision to reconvene the jury to determine if Harvest was vicariously liable for Mr. Morgan's injuries. (Mot. for Remand, at Ex. 1.) This Court has already indicated that such a course of conduct would likely be improper, (Ex. 10); therefore, there is no basis for remand pursuant to NRAP 12A.

If this Court is inclined to remand in the absence of an indicative ruling, the remand should not be accompanied by instructions or "encouragement" to

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omitted in the interest of judicial economy and efficiency).) In fact, Mr. Morgan did not make a request for transfer of the action until he ***opposed Harvest's Motion for Entry of Judgment*** in January 2019. (Opp'n to Def. Harvest Mgmt. Sub LLC's Mot. for Entry of J. & Counter-Mot. to Transfer Case Back to Chief Judge Bell for Resolution of Post-Verdict Issues (Jan. 15, 2019), attached as Ex. 12, at 10:11-11:17 (the exhibits to the motion have been omitted in the interest of judicial economy and efficiency).)

[13] EDCR 2.24(b) provides that motions for reconsideration must be filed within ten (10) days of service of the notice of entry of order resolving the original motion.

utilize Rule 49, as Mr. Morgan requests. NRCP 49 is not applicable where a claim for relief was never presented to a jury for determination.

NRCP 49(a), which is now NRCP 49(a)(3), provides that if an issue of fact raised by the pleadings or evidence is omitted from a special verdict form, the district court has the discretion to make a finding on the issue. Thus, NRCP 49(a)(3) allows a court to make findings on omitted factual issues in order to avoid "the hazard of the verdict remaining incomplete and indecisive where the jury did not decide ***every element*** of recovery or defense." 33 Fed. Proc., L. Ed. § 44:326, Omitted Issue — Substitute Finding By Court (June 2018).[14] However, NRCP 49(a)(3) does not permit the Court to decide the ***ultimate issue*** of liability or to enter judgment where there is a complete lack of pleadings or evidence to support a judgment.

Kinnel v. Mid-Atlantic Mausoleums, Inc., 850 F.2d 958 (3rd Cir. 1988) is instructive on this point. In *Kinnel*, the plaintiff brought claims against a corporate defendant and an individual defendant for breach of contract and

[14] As the Nevada Rules of Civil Procedure are closely based on the Federal Rules of Civil Procedure, this Court considers cases and authorities interpreting the federal rules as strong persuasive authority. *Exec. Mgmt. Ltd. v. Ticor Title Ins. Co.*, 118 Nev. 46, 53, 38 P.2d 872, 876 (2002); *Las Vegas Novelty, Inc. v. Fernandez*, 106 Nev. 113, 119, 787 P.2d 772, 776 (1990).

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fraudulent misrepresentation. *Id.* at 959. The written interrogatories submitted to the jury during trial failed to include any questions regarding the individual defendant's liability; therefore, the jury rendered a verdict solely against the corporate defendant. *Id.* When the district court subsequently entered judgment against both defendants pursuant to Rule 49(a), and the Third Circuit reversed:

> Rule 49(a) as we understand it, was designed to have the court supply ***an omitted subsidiary finding*** which would complete the jury's determination or verdict. For example, although we recognize that in this case no individual elements of a misrepresentation cause of action were specifically framed for the jury to answer, nevertheless, the district court could "fill in" those subsidiary elements when the ***jury returned a verdict*** finding [the corporate defendant] had misrepresented commission rates to [the plaintiff]. ***Subsumed within that ultimate jury finding*** were the five elements of misrepresentation, i.e., materiality, deception, intent, reasonable reliance and damages, each of which ***could be deemed to have been supplied by the court in accordance with the jury's judgment once the jury's ultimate verdict was known***.
>
> That procedure of supplying a finding to the ultimate verdict is a ***far cry, however, from a procedure whereby the court in the absence of a jury verdict determines the ultimate liability of a party***, as it did here. ***We have been directed to no authority which would permit the district***

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> ***court to act as it did here in depriving [the individual defendant] of his right to a jury verdict***.

Id. at 959-60, 965-66 (emphasis added). In refusing to make a finding as to the ultimate liability of the individual defendant in *Kinnel*, the Third Circuit stated that it declined to "'enter the minds of the jurors to ***answer a question that was never posed to them***.'" *Id.* at 967 (emphasis added) (quoting *Stradley v. Cortez*, 518 F.2d 488, 490 (3rd Cir. 1975).

Here, Mr. Morgan is not seeking for the district court to render specific findings as to an element of its unpled claim for vicarious liability. Rather, Mr. Morgan failed to plead a claim for vicarious liability, failed to offer any evidence at trial to prove this claim, and ***failed to present this claim to the jury for determination***. These are issues that Rule 49 cannot correct. The district court has no authority to supplant the role of the jury and render a decision as to Harvest's liability on this claim. Therefore, Mr. Morgan's Motion for Remand should be denied.

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IV. CONCLUSION

Mr. Morgan's Motion for Remand pursuant to NRAP 12A should be denied because: (1) the district court has not issued any indicative ruling that it would be willing to grant the relief sought by Mr. Morgan; and (2) the relief sought upon remand is procedurally improper and/or inapplicable. The district court cannot reconvene a dismissed jury to determine a claim that was omitted from its consideration at trial, and the district court cannot rely upon NRCP 49(a)(3) to render a verdict on a claim for relief that was never presented to the jury for determination. Remand should only be granted because this Court lacks jurisdiction over Mr. Morgan's premature appeal from a non-final judgment, and, under such circumstances, this Court should instruct the district court to enter judgment in favor of Harvest consistent with the prior rulings.

DATED this 17th day of May, 2019.

BAILEY❖KENNEDY

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

I certify that I am an employee of BAILEY❖KENNEDY and that on the 17th day of May, 2019, service of the foregoing **RESPONDENT HARVEST MANAGEMENT SUB LLC'S OPPOSITION TO MOTION FOR REMAND PURSUANT TO NRAP 12A** was made by electronic service through Nevada Supreme Court's electronic filing system and/or by depositing a true and correct copy in the U.S. Mail, first class postage prepaid, and addressed to the following at their last known address:

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EXHIBIT 14

EXHIBIT 14

IN THE SUPREME COURT OF THE STATE OF NEVADA

AARON M. MORGAN, INDIVIDUALLY,
Appellant,
vs.
DAVID E. LUJAN, INDIVIDUALLY; AND HARVEST MANAGEMENT SUB LLC, A FOREIGN LIMITED-LIABILITY COMPANY,
Respondents.

No. 77753

FILED

JUL 31 2019

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER DENYING MOTION

This appeal is assigned to the court's settlement program. Appellant has filed a motion for remand pursuant to NRAP 12A, which respondent Harvest Management Sub LLC opposes. The decision to grant or deny a motion for remand pursuant to NRAP 12A is discretionary with this court. *See* NRAP 12A(b). The court is not persuaded that a remand is warranted. Accordingly, the motion is denied. *See Sierra Foods v. Williams*, 107 Nev. 574, 576, 816 P.2d 466, 467 (1991); NRCP 49(a); *Kinnel v. Mid-Atlantic Mausoleums, Inc.*, 850 F.2d 958 (3rd Cir. 1988).

It is so ORDERED.

_____, C.J.

cc: Ara H. Shirinian, Settlement Judge
Richard Harris Law Firm
Marquis Aurbach Coffing
Bailey Kennedy
Rands, South & Gardner/Henderson

IN THE SUPREME COURT OF THE STATE OF NEVADA

AARON M. MORGAN, INDIVIDUALLY,
Appellant,
vs.
DAVID E. LUJAN, INDIVIDUALLY; AND HARVEST MANAGEMENT SUB LLC, A FOREIGN LIMITED-LIABILITY COMPANY,
Respondents.

No. 77753

FILED

SEP 17 2019

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER DISMISSING APPEAL

This is an appeal from a jury verdict and an order denying a motion for entry of judgment. Eighth Judicial District Court, Clark County; Elizabeth Goff Gonzalez, Judge.

Appellant sued respondents for personal injuries. Prior to trial, a verdict form was prepared that inadvertently omitted respondent Harvest Management Sub, LLC, from the form, thereby preventing the jury from specifying its determination as to Harvest's vicarious or respondeat superior liability. Neither the parties nor the district court noticed the omission. The jury awarded appellant damages, but no disposition resolves the claims against Harvest. Accordingly, as the parties concur, there is no final judgment at this point. *See Lee v. GNLV Corp.*, 116 Nev. 424, 426, 996 P.2d 416, 417 (2000) (defining a final judgment as "one that disposes of all the issues presented in the case, and leaves nothing to the district court's consideration except postjudgment issues such as attorney fees and costs"). Appellant attempted to resolve the matter by filing a motion for entry of judgment against Harvest, but the district court declined on the ground that the factual record was insufficient for it to make a ruling. Appellant appeals.

Harvest has filed a motion to dismiss this appeal as premature and to direct the district court to enter judgment in favor of Harvest. Appellant opposes the motion and has filed a renewed counter-motion for a limited remand pursuant to *Huneycutt v. Huneycutt*, 94 Nev. 79, 575 P.2d 585 (1978) and NRAP 12A to enable the district court to rule on the motion for entry of judgment. This court lacks jurisdiction because the judgment is not final. Jurisdiction remains vested in the district court to take whatever steps it needs to reach a final judgment. Appellant may appeal from a final judgment. The motion to dismiss is granted and this court

ORDERS this appeal DISMISSED.[1]

_____, J.
Hardesty

_____, J.
Stiglich

_____, J.
Silver

cc: Hon. Elizabeth Goff Gonzalez, District Judge
Ara Shirinian, Settlement Judge
Richard Harris Law Firm
Marquis Aurbach Coffing
Bailey Kennedy
Rands, South & Gardner/Henderson
Eighth District Court Clerk

[1]Harvest's request that this court direct the district court to enter judgment in its favor is denied.

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Steven D. Grierson
CLERK OF THE COURT

RTRAN

DISTRICT COURT

CLARK COUNTY, NEVADA

AARON MORGAN, Plaintiff, vs. DAVID LUJAN, et al., Defendants.	CASE NO. A-15-718679-C DEPT. VII

BEFORE THE HONORABLE LINDA MARIE BELL,
CHIEF JUDGE OF THE DISTRICT COURT
TUESDAY, OCTOBER 29, 2019

RECORDER'S TRANSCRIPT OF
DEFENDANT HARVEST MANAGEMENT SUB, LLC'S,
MOTION FOR ENTRY OF JUDGMENT

APPEARANCES:

For the Plaintiff:	MICAH S. ECHOLS, ESQ. BENJAMIN P. CLOWARD, ESQ.
For Defendant Harvest Management:	DENNIS L. KENNEDY, ESQ. SARAH E. HARMON, ESQ. ANDREA CHAMPION, ESQ.

RECORDED BY: RENEE VINCENT, COURT RECORDER

Case Number: A-15-718679-C

Tuesday, October 29, 2019 - Las Vegas, Nevada

[Proceedings begin at 9:01 a.m.]

MS. HARMON: Good morning.

THE COURT: Good morning. All right. Let's get everybody's appearance for the record, please.

MR. CLOWARD: Your Honor, Ben Cloward for the Plaintiff, Aaron Morgan.

MR. ECHOLS: Good morning, Your Honor. Micah Echols for the Plaintiff.

MR. KENNEDY: Your Honor, Dennis Kennedy for Defendant Harvest Management, along with Andrea Champion and then Sarah Harmon.

MS. CHAMPION: Good morning.

THE COURT: All right. So this came back from the Nevada Supreme Court, and this is on for the motion for entry of judgment. So Mr. Kennedy.

MR. KENNEDY: Your Honor, again, Dennis Kennedy for Harvest Montara. All that remains is for this Court to enter judgment dismissing the Plaintiff's claims against my client. Then that will be a final judgment. And if the Plaintiff then wants to appeal that, it will be ready for appeal.

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

MR. KENNEDY: Nevertheless, the status of the case is this, when it was in

front of Judge Gonzalez, the Plaintiff asked that judgment be entered in the Plaintiff's favor. Judge Gonzalez denied that motion.

THE COURT: I understand.

MR. KENNEDY: And so --

THE COURT: I honestly think the best thing at this point would to reconvene the jury, if that's possible, and have them make a determination.

MR. KENNEDY: I respectfully suggest that it's not, and I think the Supreme Court indicated that in an earlier order. And all that remains is for judgment to be entered in favor of my client. Then it can go to the Supreme Court, and if any of these issues are valid, the Supreme Court can take them up.

THE COURT: All right. Thank you.

MR. ECHOLS: Good morning, Your Honor. So on the issue of reconvening the jury, I know that's where the Court kind of left off when we were before the Supreme Court dismissed the appeal.

And in the interim, I don't know if the Court saw this, but Harvest filed a writ petition to the Supreme Court in a separate case and said, hey, the District Court lacks jurisdiction to reconvene a jury once it's been released. And the Supreme Court actually agreed with them on that and said, but we're not going to grant extraordinary relief to the writ petition because it was a *Honeycutt* certification instead of an actual order.

THE COURT: Right.

MR. EICHOLS: And so we agree with Harvest that the jury shouldn't be reconvened, and I think the Supreme Court would probably intervene if there were an order to reconvene the jury, but -- but here's how we think this should go.

We did file a motion for entry of judgment in front of Judge Gonzalez

on a Rule 49(a), and 49(a) essentially says that if there is an issue not submitted to the jury -- or not decided by the jury, then it's a question for the judge to answer. And here we have what is clearly a clerical error.

THE COURT: Yeah.

MR. ECHOLS: Now, the fact that Judge Gonzalez denied our motion for entry of judgment is really of no consequence. It's not law of the case, and actually 54(b) allowed the Court to revisit that. Because the logical conclusion is, if Harvest's motion for entry of judgment is denied, then the only alternative is to then grant our requested relief, which is to add Harvest to the verdict form and, therefore, the judgment.

I'm happy to go into more details, but I know we've argued this, I think, twice already, and so I don't want to do that unless Your Honor wants it.

THE COURT: No. That's okay.

MR. ECHOLS: Okay. Thank, Your Honor.

MR. KENNEDY: Your Honor, just one point with respect to their 49(a) motion, the Supreme Court ruled Rule 49(a) does not apply. So that -- that question is settled.

MR. ECHOLS: I don't recall the Supreme Court ever ruling on Rule 49. The only thing that the Supreme Court said is that they lacked jurisdiction, and so I don't know how they could've made a finding on a case for which they didn't have jurisdiction.

THE COURT: Thank you, gentlemen. I will get you a decision very shortly. Thank you.

MR. ECHOLS: Thank Your Honor.

/ / /

MR. KENNEDY: Thank you, Your Honor.

[Proceeding concluded at 9:06 a.m.]

ATTEST: I do hereby certify that I have truly and correctly transcribed the audio-visual recording of the proceeding in the *above* entitled case to the best of my ability.

Renee Vincent

Renee Vincent, Court Recorder/Transcriber

DAO

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

AARON M. MORGAN, individually, Plaintiff, *vs.* DAVID E. LUJAN, individually, HARVEST MANAGEMENT SUB LLC; a Foreign-Limited Liability Company; DOES 1 through 20; ROE BUSINESS ENTITIES 1 through 20, inclusive jointly and severally, Defendants.	Case No. A-15-718679-C Dept. No. VII

DECISION AND ORDER

Defendant Harvest Management Sub LLC filed a Motion for Entry of Judgment in Harvest's favor. Harvest argues that Aaron Morgan failed to properly pursue his claim of vicarious liability against Harvest and therefore abandoned his claim against Harvest. Mr. Morgan had previously filed his own Motion for Entry of Judgment in Department 11. Mr. Morgan now files an Opposition and Counter-Motion arguing that vicarious liability was tried by consent. This matter came before the Court for oral argument on March 5, 2019, and on October 29, 2019.

After review of the pleadings, the trial record, and oral arguments, the Court denies Harvest's Motion for Entry of Judgment. Pursuant to NRCP 42(b), the Court orders a separate trial on the issue of Harvest's vicarious liability. All parties shall appear in Department 7 on January 14, 2020, at the hour of 9:00 a.m. for a status check on trial setting.

I. Factual and Procedural Background

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. Mr. Morgan's car collided into the bus and Mr. Morgan sustained injuries as a result of the accident. Mr. Morgan filed

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a complaint for damages on May 5, 2015. Mr. Morgan's complaint contained three causes of action. Mr. Morgan's first two causes of action alleged negligence and negligence per se against employee defendant, David E. Lujan. In the third cause of action, Mr. Morgan alleged vicarious liability/respondeat superior against defendant Harvest Management Sub LLC.

On June 16, 2015, Douglas J. Gardner, Esq. of Rands, South & Gardner filed an answer on behalf of both Harvest and Mr. Lujan. In their answer, Harvest and Mr. Lujan denied any negligence by Mr. Lujan. Harvest admitted that 1) Mr. Lujan was an employee of Harvest; 2) Harvest was the owner of the bus and had control of the bus; and 3) that Harvest had entrusted the bus to Mr. Lujan. Harvest denied, however, that Mr. Lujan had been acting in the course and scope of employment when the accident occurred. Rands, South & Gardner were defense counsel for both Harvest and Mr. Lujan throughout the discovery process and each of the trials in this case.

Trial was originally set for April 24, 2017, but defense counsel requested a continuance due to Mr. Lujan's hospitalization. Trial was continued to November 6, 2017. The first day of trial consisted of jury selection, and on the second day of trial the jury heard Mr. Morgan's opening statement and testimony from a medical expert. On the third day, the jury heard testimony from additional medical experts, as well as testimony from the bus driver, Mr. Lujan. The final witness of the day was Mr. Morgan's mother. On cross-examination, however, defense counsel asked Mr. Morgan's mother about a pending DUI charge against Mr. Morgan. Mr. Morgan requested a mistrial and the Court granted the request.

The second trial began on April 2, 2018. Mr. Lujan was not present for the second trial, though parts of Mr. Lujan's testimony from the first trial were read into the record. The jury did, however, hear live testimony from Harvest's corporate representative, Erica Janssen. Ms. Janssen was present for the entirety of the second trial and she testified on the fourth and fifth days of trial. The sixth and final day of trial was April 9, 2018. The parties did not provide a verdict form, but the parties agreed to use a special verdict form that had originally been prepared by the Court for another trial. While Harvest was included in the caption on the jury instructions, the verdict form inadvertently omitted Harvest from the caption. The form also designated a singular "Defendant" instead of referring to multiple Defendants. The special verdict form asked four questions: 1) Was

Defendant negligent? 2) Was Plaintiff negligent? 3) What percentage of fault do you assign to each party? 4) What amount do you assess as the total amount of Plaintiff's damages? Using this flawed form, the jury assigned 100% fault to the "Defendant" and awarded Mr. Morgan $2,980,000.00 in damages. Following the jury's verdict, the law firm Bailey Kennedy substituted as counsel for Harvest only on April 26, 2018.

On July 2, 2018, this case was reassigned to Judge Gonzalez in Department 11. Mr. Morgan filed a Motion for Entry of Judgment on July 30, 2018. Mr. Morgan argued that judgment should be entered against both Harvest and Mr. Lujan pursuant to Nevada Rule of Civil Procedure 49(a). NRCP 49(a)(3) provides that if an issue of fact is "raised by the pleadings or evidence but not submitted to the jury" and neither party demands that the issue is submitted to the party, "the court may make a finding on the issue." Judge Gonzalez denied the motion on the basis that the jury instructions failed to show that the claims against Harvest were submitted to the jury.

On December 17, 2018, judgment was entered against Mr. Lujan individually and the following day Mr. Morgan appealed the judgment to the Nevada Supreme Court. On December 21, 2018, Harvest's counsel filed their Motion for Entry of Judgment. Mr. Morgan filed an Opposition and Counter-Motion on January 15, 2019. Mr. Morgan's counter-motion sought reassignment of the case back to Department 7 for resolution of the post-verdict issues. Judge Gonzalez granted the counter-motion in part on February 7, 2019, and the case was referred to Department 7 for a decision on Harvest's motion. The Court heard arguments on Harvest's Motion for Entry of Judgment on March 5, 2019. For the sake of convenience, the case was reassigned back to Department 7 on March 14, 2019.

On April 5, 2019, the Court issued a Decision and Order on Harvest's Motion for Entry of Judgment. The Court ruled that it was without jurisdiction to render a decision on the motion due to the pending appeal before the Supreme Court. The Court certified, however, that if the case was remanded by the Supreme Court, the Court would reconvene the jury to consider if their verdict applied to Harvest. The Nevada Supreme Court dismissed the appeal on September 17, 2019, holding that the Supreme Court did not have jurisdiction because the judgment in the case was not

final. Following the Supreme Court's decision, the matter came before the Court for additional oral arguments on October 29, 2019.

II. Discussion

A. The Court cannot reconvene the jury because the jury has been dispersed.

In its April 5th Decision and Order, the Court certified that it would reconvene the jury to consider if their verdict applied to Harvest. Generally, "a trial court is without authority or jurisdiction to reconvene a jury once it has been dismissed." Sierra Foods v. Williams, 816 P.2d 466, 467 (Nev. 1991). A trial court may only reconvene a jury if "the jury has not yet dispersed or lost its separate identity and when the moving party has presented no proof of outside influence." Id. In Sierra Foods, the Nevada Supreme Court found that a jury had not been dispersed because the jury had not yet left the courthouse and effectively remained under the control of the court. Id.

Here, the Court cannot reconvene the jury because the jury has been dispersed. The jury was dismissed over one-and-a-half years ago on April 9, 2018. The jury has lost its separate identity and the Court has lost jurisdiction over the jury. Therefore, the Court is without authority to reconvene the jury.

B. The Court cannot make a finding on Harvest's vicarious liability because the issue was not addressed at trial.

Based on the fact that the special verdict form erroneously omitted Harvest from the caption, Harvest now argues that Mr. Morgan voluntarily abandoned his claim of vicarious liability against harvest. Harvest further argues that, as a matter of law, the evidence presented at trial shows that Harvest is entitled to judgment in its favor on Mr. Morgan's claim of vicarious liability.

1. The evidence presented at trial does not entitle Harvest to judgment in its favor.

The Court first addresses Harvest's argument that the evidence at trial proved that Harvest could not be liable for vicarious liability as a matter of law. 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. At trial, Mr. Lujan testified

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that he drove Harvest's bus to the park to eat lunch, and that he was leaving the park when the accident occurred.

Vicarious liability attaches when an employee is under the control of the employer and the tortious conduct occurred within the scope of employment. National Convenience Stores, Inc. v. Fantauzzi, 584 P.2d 689, 691 (Nev. 1978). The Nevada Supreme Court has adopted the "going and coming" rule, which provides that an employer is not liable for an employee's tortious conduct when the employee is in transit to or from work. Id. The "going and coming" rule does not apply if the employee was conducting a special errand or job responsibility on behalf of the employer. Molino v. Asher, 618 P.2d 878, 880 (Nev. 1980).

Harvest acknowledges that the Nevada Supreme Court has not specifically addressed whether an employer is vicariously liable for an employee's actions during a lunch break. But, Harvest argues that the express language and the policy behind the "going and coming" rule is applicable to an employee that is commuting to and from lunch. Harvest cites to other jurisdictions which have determined that an employer is not liable for an employee's negligence during a lunch break. California, for example, has held that "[t]he general rule is that when an employee is traveling to or from lunch, even in the employer's vehicle, and performing no services for the employer, he is not acting within the scope of his employment for purposes of respondeat superior liability." Halliburton Energy Servs., Inc. v. Dep't of Transportation, 162 Cal. Rptr. 3d 752, 764 (Cal. App. 2013); see also Knecht v. Vandalia Med. Ctr., 470 N.E.2d 230, 233 (Ohio App.1984) (holding that an employee is generally not considered to be acting within the scope of his employment when, "he is off duty, as at the noon hour."); but see Howard v. City of Alexandria, 581 So. 2d 321, 323 (La. Ct. App. 1991) (holding that employer was liable for an employee's lunchtime accident when the employer exercised control over the employee at lunch and the employer derived a benefit from employee's lunchtime use of employer's vehicle, even though the general rule stated employees are not within the course and scope of employment while going to and from lunch.).

In contrast, however, many jurisdictions presume that an employee is acting within the course and scope of their employment when an accident occurs while driving the employer's vehicle and the employer must rebut that presumption with clear and convincing evidence. Savoy v. Harris,

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20 So. 3d 1075, 1079 (La. App. 2009); see also Matheson v. Braden, 713 S.E.2d 723, 726 (Ga. App. 2011) (presumption that an employee was acting within the scope of his employment when driving his employer's vehicle could be overcome with "uncontradicted evidence"); Robertson Tank Lines, Inc. v. Van Cleave, 468 S.W.2d 354, 357 (Tex. 1971) ("It is recognized in Texas that when it is proved that the truck was owned by the defendant and that the driver was in the employment of defendant, a presumption arises that the driver was acting within the scope of his employment when the accident occurred."). An employer may rebut the presumption by showing that the employer derived no benefit from the employee's use of the vehicle. See Howard, 581 So. 2d at 323-24; Robertson, 468 S.W.2d at 358; Cincinnati Transit, Inc. v. Tapley, 273 N.E.2d 906, 907 (Ohio Ct. App. 1971) (holding that employer failed to rebut the presumption of vicarious liability when the employer did not present evidence that their driver was on an excursion or frolic). Evidence that an employee is still under the control of the employer during lunch is evidence that the employer experiences a benefit from the employee's use of an employer's vehicle. Howard, 581 So.2d at 323. 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.

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. The "going and coming" rule as articulated by the Nevada Supreme Court does not specifically address an employee's lunchtime commute, and there is no consensus amongst jurisdictions on the subject. The fact that Mr. Lujan was leaving the park after finishing his lunch does not conclusively establish that Mr. Lujan was not acting within the scope of his employment when the accident occurred. This is especially true given the fact that Mr. Lujan was driving a bus owned by Harvest and Harvest admitted to having control over the bus at the time of the accident. Harvest's motion for entry of judgment on these grounds is therefore denied.

But, the same evidence also fails to establish that Mr. Lujan was acting within the scope of his employment at the time of the accident. There was insufficient evidence at trial as to whether

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or not Mr. Lujan was conducting a special errand or job responsibility when the accident occurred. The sole testimony on what Mr. Lujan was doing at the time of the accident came in Mr. Lujan's response to a jury question:

> [The Court]: Where were you going at the time of the accident?
>
> [Mr. Lujan]: I was coming back from lunch. I had just ended my lunch break.
>
> Transcript of Jury Trial, November 8, 2017, at page 132.

Mr. Lujan's response is insufficient to make a determination on vicarious liability because his answer does not specify the destination or the purpose of Mr. Lujan's commute. The lack of evidence presented at trial on Mr. Lujan's scope of employment leads to Harvest's second argument.

2. Mr. Morgan did not abandon his claim of vicarious liability against Harvest.

Harvest argues that Mr. Morgan's failure to present the claim of vicarious liability to the jury shows that Mr. Morgan voluntarily chose to abandon his claim against Harvest. Harvest acknowledges, however, that it is unusual for a claim to be abandoned without a stipulation dismissing the claim with prejudice. Mr. Morgan responds that vicarious liability was tried by consent, and Harvest's litigation of the case shows that Harvest chose not to contest its vicarious liability. At oral argument, Mr. Morgan asserted that evidence of vicarious liability wasn't presented at trial because Harvest did not contest this issue.

Mr. Morgan's position is understandable. This case was assigned to the Court for nearly three years and the Court presided over both trials in this case. While Harvest and Mr. Lujan's written answer denied that Mr. Lujan was acting within the scope of his employment, Harvest never argued against vicarious liability during the pre-trial litigation or during the trials themselves. In fact, Harvest's trial counsel would have been barred from making such an argument at trial because it would have an impermissible conflict of interest.

Rule 1.7 of the Nevada Rules of Professional Conduct provides that "a lawyer shall not represent" concurrent clients if "[t]he representation of one client will be directly adverse to another client" or "[t]here is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client." NRCP 1.7(a). Here, Harvest and Mr.

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Lujan were represented by the same counsel throughout the pre-trial litigation and at both trials. Counsel's representation of both Harvest and Mr. Lujan would have been a concurrent conflict if Harvest argued that it could not be vicariously liable for Mr. Lujan's actions. That argument would have materially limited counsel's responsibilities to Mr. Lujan because it would have required counsel to assert that Mr. Lujan should be solely responsible for any liability found by the jury.

Instead of arguing that Harvest was not vicariously liable, the trial record shows that there was no distinction made between Harvest and Mr. Lujan's liability as defendants. During their opening statement, Harvest and Mr. Lujan's counsel outlined their defense to the jury as the following:

> Now, what was this accident all about? What happened in this accident? Did we just - we're going to show you that the actions of our driver were not reckless. They weren't wild. The impact did occur. We agree with that. Most of the things we're going to show you are going to show you some inconsistences with the testing that was done on [Mr. Morgan].
>
> Transcript of Jury Trial, April 3, 2018, at pages 147-48.

There was nothing in Harvest's opening statement, or any other part of the record, to suggest that Harvest and Mr. Lujan were pursuing separate defenses to liability. Erica Janssen, Harvest's corporate representative, made the following representations on the stand:

> [Mr. Morgan's counsel]: So what was it that Aaron did that was more negligent than Mr. Lujan?
>
> [Ms. 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.
>
> Transcript of Jury Trial, April 5, 2018, at page 171.
>
> [Mr. Morgan's counsel]: Mr. Lujan didn't place blame on Aaron, but you're here placing blame on Aaron, correct?
>
> [Ms. Janssen]: I am.
>
> Transcript of Jury Trial, April 5, 2018, at page 176.

[Mr. Morgan's counsel]: Okay. And in this matter, you've continued to allege that Mr. Morgan is at fault and that a third party is at fault, true?

[Ms. Janssen]: That's our answer.

Transcript of Jury Trial, April 6, 2018, at page 10.

Ms. Janssen never asserted that Harvest was not responsible for any liability arising from the accident. Instead, Ms. Janssen testified to defenses against liability that placed fault for the accident with Mr. Morgan and an unidentified third party. All of Harvest and Mr. Lujan's defenses at trial were directed towards fault, damages, and suitability of Mr. Morgan's treatment. Harvest presented nothing to suggest that Harvest was contesting vicarious liability for the accident.

The fact that Harvest and Mr. Lujan were represented by the same counsel, plus the manner in which their shared counsel litigated the case, made it appear that Harvest chose not to contest vicarious liability. Mr. Lujan did not abandon his claim of vicarious liability against Harvest, but instead proceeded to trial on the assumption that Harvest was not contesting the issue. Harvest's motion for entry of judgment on these grounds is therefore denied.

3. A separate trial on the issue of vicarious liability is appropriate under NRCP 42(b).

Under Rule 42 of the Nevada Rules of Civil Procedure, "the court may order a separate trial of one or more separate issues" for the purposes of "convenience, to avoid prejudice, or to expedite and economize." NRCP 42(b). An order for a separate trial is an exercise of the district court's sound discretion. California State Auto. Ass'n Inter-Ins. Bureau v. Eighth Judicial Dist. Court of State of Nev., In & For Cty. of Clark, 788 P.2d 1367, 1368 (Nev. 1990). Prejudice occurs when a party is denied a meaningful opportunity to rebut evidence at trial. See ATC/Vancom of Nevada Ltd. P'ship v. MacDonald, 281 P.3d 1151 (Nev. 2009). The "district court may not bifurcate a trial if the plaintiffs damages are inextricably interrelated with the defendant's liability." Id. But, a separate trial on the issue of liability is justified when liability is separate and distinct from the issue of damages. Verner v. Nevada Power Co., 706 P.2d 147, 150 (Nev. 1985) (holding that the issues of liability and damages were inextricably intertwined when medical testimony of the injury was necessary to show how the accident occurred).

Here, a separate trial on the issue of vicarious liability is appropriate to avoid prejudice and because the issue of vicarious liability is separate and distinct from the issue of damages. At trial, Mr. Morgan did not present evidence on the issue of vicarious liability, but Harvest also did not present any evidence to contest the issue. The issue was therefore never addressed at trial, and the Court cannot enter judgment on vicarious liability on the limited evidence presented at trial without prejudicing either parties' opportunity to address the evidence. Furthermore, the issues of vicarious liability and damages are separate and distinct. As discussed above, vicarious liability attaches when an employee is under the control of the employer and the tortious conduct occurred within the scope of employment. Evidence of damages is not necessary to show that an employee is under the control of an employer, nor is evidence of damages necessary to show that the accident occurred within the scope of employment. Therefore, it is appropriate for the Court to order a separate trial on the issue of Harvest's vicarious liability.

III. Conclusion

The evidence at trial is insufficient to establish whether Mr. Lujan was or was not acting within the scope of his employment when the accident occurred. But, the lack of evidence on the issue of vicarious liability does not show that Mr. Morgan abandoned the claim. Harvest's litigation of the case suggested that Harvest choose not to contest vicarious liability, and Mr. Morgan tried the case under that assumption.

Therefore, the Court denies Harvest's Motion for Entry of Judgment. Pursuant to NRCP 42(b), the Court orders a separate trial on the issue of Harvest's vicarious liability.

All parties shall appear in Department 7 on January 14, 2020, at the hour of 9:00 a.m. for a status check on trial setting.

DATED this day of January 3, 2020.

LINDA MARIE BELL
DISTRICT COURT JUDGE

LINDA MARIE BELL
DISTRICT JUDGE
DEPARTMENT VII

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the date of filing, a copy of this Order was electronically served through the Eighth Judicial District Court EFP system or, if no e-mail was provided, by facsimile, U.S. Mail and/or placed in the Clerk's Office attorney folder(s) for:

Name	Party
Micah S. Echols, Esq. Marquis Aurbach Coffing 10001 Park Run Drive Las Vegas, Nevada 89145	Counsel for Plaintiff
Benjamin P. Cloward, Esq. Bryan A. Boyack, Esq. Richard Harris Law Firm 801 South Fourth Street Las Vegas, Nevada 89101	Counsel for Plaintiff
Dennis L. Kennedy, Esq. Sarah E. Harmon, Esq. Joshua P. Gilmore, Esq. Andrea M. Champion, Esq. Bailey * Kennedy c/o Dennis L. Kennedy 8984 Spanish Ridge Avenue Las Vegas, Nevada 89148	Counsel for Harvest Management Sub LLC
Douglas J. Gardner, Esq. 1055 Whitney Ranch Dr., Suite 220 Henderson, Nevada 89014	Counsel for David Lujan

SYLVIA PERRY
JUDICIAL EXECUTIVE ASSISTANT, DEPARTMENT VII

AFFIRMATION
Pursuant to NRS 239B.030
The undersigned does hereby affirm that the preceding Decision and Order filed in District Court case number A718679 **DOES NOT** contain the social security number of any person.

/s/ Linda Marie Bell Date: 01/3/2020
District Court Judge

LINDA MARIE BELL
DISTRICT JUDGE
DEPARTMENT VII

DISTRICT COURT
CLARK COUNTY, NEVADA

Negligence - Auto	**COURT MINUTES**	**January 14, 2020**

A-15-718679-C Aaron Morgan, Plaintiff(s)
vs.
David Lujan, Defendant(s)

January 14, 2020 **09:00 AM** **All Pending Motions**

HEARD BY: Bell, Linda Marie **COURTROOM:** RJC Courtroom 17A

COURT CLERK: Estala, Kimberly

RECORDER: Vincent, Renee

REPORTER:

PARTIES PRESENT:

Andrea M. Champion	**Attorney for Defendant**
Bryan A. Boyack	**Attorney for Plaintiff**
Dennis L. Kennedy	**Attorney for Defendant**
Micah S. Echols	**Attorney for Plaintiff**
Sarah E. Harmon	**Attorney for Defendant**

JOURNAL ENTRIES

STATUS CHECK: TRIAL SETTING...STATUS CHECK: DECISION...

Court advised in reviewing the case it finds it cannot made a decision as their is not enough information therefore the only option is to proceed with trial on this issue. Upon Court's inquiry, parties do not need additional discovery, would request a jury trial, and trial would last approximately 3 days. COURT ORDERED, trial date SET.

06/16/20 9:00 AM CALENDAR CALL

06/22/20 11:00 AM JURY TRIAL

Electronically Filed
2/12/2020 11:20 AM
Steven D. Grierson
CLERK OF THE COURT

RTRAN

DISTRICT COURT

CLARK COUNTY, NEVADA

AARON MORGAN, Plaintiff, vs. DAVID LUJAN, et al., Defendants.	CASE NO.: A-15-718679 DEPT. VII

BEFORE THE HONORABLE LINDA MARIE BELL,
DISTRICT COURT JUDGE
TUESDAY, JANUARY 14, 2020

RECORDER'S TRANSCRIPT OF HEARING:
STATUS CHECK: DECISION AND TRIAL SETTING

APPEARANCES:

For the Plaintiff: MICHAH ECHOLS, ESQ.
BRYAN A. BOYACK, ESQ.

For Defendant Harvest Management: DENNIS L. KENNEDY, ESQ.
SARAH E. HARMON, ESQ.
ANDREA M. CHAMPION, ESQ.

RECORDED BY: RENEE VINCENT, COURT RECORDER

Las Vegas, Nevada, Tuesday, January 14, 2019

[Hearing commenced at 9:29 a.m.]

THE COURT: Can I get everyone's appearances for the record, please.

MR. ECHOLS: Good morning, Your Honor. Micah Echols for Plaintiff.

MR. BOYACK: Good morning, Your Honor. Bryan Boyack for Plaintiff.

MR. KENNEDY: For Harvest Management Sub, LLC, Sarah Harmon, Andrea Champion and Dennis Kennedy.

THE COURT: All right. Thank you, folks. So after looking at all of this again, it just -- there isn't enough information for me to make a decision. There isn't any information at all, really, so I think the only answer we have here is to have the trial on that issue. But what I need from everybody is, do you feel like you need any additional discovery at this point, and when can we set the trial?

MR. KENNEDY: All right. With counsel's permission, can I just raise one issue?

MR. ECHOLS: Sure.

MR. KENNEDY: Your Honor, Dennis Kennedy again for Harvest Management Sub, LLC. The Court's order granting the new trial does it on a ground that wasn't -- it wasn't briefed or argued by either of the parties. It's the use of Rule 42(b) post-trial to grant a new trial.

I was wondering if we could get an opportunity to brief that

issue. I think there's a substantial question as to the Court's ability to use Rule 42(b) post-trial to grant a new trial, and, as I said, that's a ruling that the Court made without the benefits of briefs and arguments from –

THE COURT: So, Mr. Kennedy, you're welcome to file a motion for reconsideration. In the meantime, let's figure out what the schedule would be.

MR. KENNEDY: Okay. And -- and the other request I would have is, once we get the schedule agreed to, I'd ask the Court to stay its order, so we can file a petition -- a writ petition with the Nevada Supreme Court.

THE COURT: Okay.

MR. KENNEDY: I have to ask this Court first for the stay.

THE COURT: Right.

MR. KENNEDY: Okay. Thank you.

MR. ECHOLS: On the stay issue, Your Honor, I don't think that's necessary for a writ petition. Of course, if the Supreme Court –

THE COURT: Well –

MR. ECHOLS: -- wants to –

THE COURT: -- I don't have that in front of me right now –

MR. ECHOLS: Okay.

THE COURT: -- so what I want to do today is find out if you need any discovery and set a schedule, and then we can deal with everything else as it goes.

[Defense counsel confers]

MR. ECHOLS: Your Honor, in conferring with co-counsel. I

think based upon our witnesses that have already been disclosed and the documents we already have -- and we don't think we need any additional discovery. And one question I had is, did the Court contemplate this as being a bench trial? A jury trial?

THE COURT: That's up to you all as to -- I mean, there was -- the first trial was a bench trial -- or a jury trial, so that's really entirely up to -- to the parties. If you want to have a bench trial, you're entitled to that.

MR. KENNEDY: The Plaintiff --

THE COURT: I mean a jury trial. Sorry.

MR. KENNEDY: Yeah, the Plaintiffs demanded a jury, so I – the first two trials were jury trials. I think this has to be a jury trial.

MR. ECHOLS: That's fine with us. We just wanted to know if the Court had any thoughts on that.

THE COURT: No. I mean, if you – if you agree that you wanted to do it as a bench trial, I don't think that's a problem. But, otherwise, I would presume that it would be a jury trial since there was already a demand in --

MR. KENNEDY: Yeah.

THE COURT: -- the case --

MR. ECHOLS: Sure.

THE COURT: -- to a jury -- well, it was tried in front of a jury at least partially twice, so --

MR. ECHOLS: Sure. So we'll -- we'll stick with a jury trial.

MR. KENNEDY: Yeah, I think we -- I think we have to.

THE COURT: Right. Mr. Kennedy, do you anticipate needing any additional discovery?

MR. KENNEDY: No, Your Honor. We'll -- we'll play off the deck we've been dealt.

THE COURT: And in terms of dates, what would work for everyone?

MR. ECHOLS: We have our collective availability for the Plaintiff's counsel. Do you want me to just give you those dates, Your Honor?

THE COURT: Yeah.

MR. ECHOLS: I have May 18th, June 15th, June 22nd, June 29th, August 10th, August 17th, August 24th. And I would think this would probably be maybe a three-day trial if it's a jury. Maybe only one day of testimony and then jury selection, opening statements, testimony and closing arguments, I think, would be about three days.

MR. KENNEDY: Your Honor, for –

THE COURT: Three might be long, but I agree, it wouldn't be more than that.

MR. KENNEDY: Yeah, I think so. For the Defendant, I am on a jury stack commencing May 11th, so May is not going to be too good for me.

THE COURT: How's June?

MR. KENNEDY: But June, July and August work good because I don't have another trial scheduled until September.

THE COURT: Do you want to do later in June then?

MS. HARMON: Yeah. It would have to be late June.

MR. KENNEDY: Yeah, late June.

THE COURT: So maybe the week of the 22nd?

MR. KENNEDY: Yeah, I think that would be great.

MR. ECHOLS: That works for us, Your Honor.

THE COURT: And then we'll do calendar call on June 16th at 9 a.m.

MR. ECHOLS: And then the stack starts on June 22nd?

THE COURT: I don't have a stack, so --

MR. ECHOLS: Oh.

MR. BOYACK: We get that week.

THE COURT: It's a firm setting, so I – it really has to be for me because I have – otherwise, I have to block out everything, so --

MR. ECHOLS: Okay.

THE COURT: All right. Thank you, folks.

MR. KENNEDY: Okay. Thank Your Honor.

MR. ECHOLS: Thank Your Honor.

[Hearing concluded at 9:35 a.m.]

* * * * * *

ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/video proceedings in the above-entitled case to the best of my ability.

Kerry Esparza
Court Recorder/Transcriber

Register of Actions
Case No. A-15-718679-C

Aaron Morgan, Plaintiff(s) vs. David Lujan, Defendant(s)

Case Type:	**Negligence - Auto**
Date Filed:	**05/20/2015**
Location:	**Department 7**
Cross-Reference Case Number:	**A718679**
Supreme Court No.:	**77753**

Party Information

		Lead Attorneys
Defendant	**Harvest Management Sub LLC**	**Dennis L. Kennedy** *Retained* 7025628820(W)
Defendant	**Lujan, David E**	**Douglas J Gardner, ESQ** *Retained* 702-940-2222(W)
Plaintiff	**Morgan, Aaron M**	**Micah S. Echols** *Retained* 702-655-2346(W)

Events & Orders of the Court

DISPOSITIONS

08/30/2017 **Partial Summary Judgment** (Judicial Officer: Bell, Linda Marie)
Debtors: David E Lujan (Defendant), Harvest Management Sub LLC (Defendant)
Creditors: Aaron M Morgan (Plaintiff)
Judgment: 08/30/2017, Docketed: 08/31/2017

04/09/2018 **Verdict** (Judicial Officer: Gonzalez, Elizabeth)
Debtors: David E Lujan (Defendant)
Creditors: Aaron M Morgan (Plaintiff)
Judgment: 04/09/2018, Docketed: 12/17/2018
Total Judgment: 2,980,980.00

12/17/2018 **Judgment Upon the Verdict** (Judicial Officer: Gonzalez, Elizabeth)
Debtors: David E Lujan (Defendant)
Creditors: Aaron M Morgan (Plaintiff)
Judgment: 12/17/2018, Docketed: 12/17/2018
Total Judgment: 3,046,382.72

10/18/2019 **Clerk's Certificate** (Judicial Officer: Bell, Linda Marie)
Debtors: Aaron M Morgan (Plaintiff)
Creditors: David E Lujan (Defendant), Harvest Management Sub LLC (Defendant)
Judgment: 10/18/2019, Docketed: 10/21/2019
Comment: Supreme Court No. 77753 " Appeal Dismissed"

10/24/2019 **Order** (Judicial Officer: Bell, Linda Marie)
Debtors: David E Lujan (Defendant)
Creditors: Aaron M Morgan (Plaintiff)
Judgment: 10/24/2019, Docketed: 10/28/2019
Total Judgment: 4,981.50

OTHER EVENTS AND HEARINGS

05/20/2015 **Case Opened**
05/20/2015 **Complaint**
Complaint
05/28/2015 **Affidavit of Service**
Affidavit of Service - Harvest Management Sub LLC
06/01/2015 **Affidavit of Service**
Affidavit of Service - David E Lujan
06/16/2015 **Answer to Complaint**
Defendants' Answer to Plaintiff's Complaint
06/16/2015 **Initial Appearance Fee Disclosure**
Initial Appearance Fee Disclosure (NRS Chapter 19)
06/16/2015 **Demand for Jury Trial**
Demand for Jury Trial
10/14/2015 **Commissioners Decision on Request for Exemption - Granted**
Commissioner's Decision on Request for Exemption
12/04/2015 **Arbitration File**
Arbitration File

12/11/2015	**Arbitration File** *Arbitration File*
12/21/2015	**Joint Case Conference Report** *Joint case Conference Report*
01/21/2016	**Scheduling Order** *Scheduling Order*
02/03/2016	**Order Setting Civil Jury Trial** *Order Setting Civil Jury Trial*
08/30/2016	**Stipulation to Extend Discovery** *Stipulation and Order to Extend Discovery and Continue Trial*
09/16/2016	**Order Setting Civil Jury Trial** *Second Order Setting Civil Jury Trial*
11/29/2016	*CANCELED* **Status Conference** (9:00 AM) (Judicial Officer Bell, Linda Marie) *Vacated - per Stipulation and Order*
12/29/2016	**Status Conference** (9:00 AM) (Judicial Officer Bell, Linda Marie) *Status Conference: Status of Case Re: Trial Setting* Parties Present Minutes Result: Matter Heard
01/31/2017	*CANCELED* **Calendar Call** (9:00 AM) (Judicial Officer Bell, Linda Marie) *Vacated - per Stipulation and Order*
02/06/2017	*CANCELED* **Jury Trial** (9:00 AM) (Judicial Officer Bell, Linda Marie) *Vacated - per Stipulation and Order*
02/22/2017	**Pre-Trial Disclosure** *Plaintiff's Pre-Trial Disclosures and Objections Pursuant to N.R.C.P. 16.1 (a)(3)*
02/23/2017	**Notice** *Notice of EDCR 2.67 Conference*
02/27/2017	**Joint Pre-Trial Memorandum** *Plaintiff Aaron M. Morgan's and Defendants David E. Lujan and Harvest Management Sub, LLC's Joint Pre-Trial Memorandum*
03/06/2017	**Stipulation and Order** *Stipulation and Order to Exclude Defendant's Biomechanical Expert John Baker, P.E., PH.D.*
03/06/2017	**Notice of Entry of Stipulation and Order** *Notice of Entry of Order*
03/07/2017	**Calendar Call** (9:00 AM) (Judicial Officer Bell, Linda Marie) Parties Present Minutes Result: Matter Heard
03/07/2017	**Notice of Appearance** *Notice of Appearance*
03/07/2017	**Order Setting Civil Jury Trial** *Third Order Setting Civil Jury Trial*
03/13/2017	*CANCELED* **Jury Trial** (9:00 AM) (Judicial Officer Bell, Linda Marie) *Vacated - per Judge*
04/04/2017	*CANCELED* **Calendar Call** (9:00 AM) (Judicial Officer Bell, Linda Marie) *Vacated*
04/04/2017	**Calendar Call** (9:00 AM) (Judicial Officer Bell, Linda Marie) Parties Present Minutes Result: Trial Date Set
04/20/2017	**Notice of Association of Counsel** *Notice of Association of Counsel*
04/24/2017	**Jury Trial - FIRM** (9:00 AM) (Judicial Officer Bell, Linda Marie) Parties Present Minutes Result: Off Calendar
05/10/2017	**Motion for Partial Summary Judgment** *Plaintiff's Motion for Partial Summary Judgment Regarding Plaintiff's Past Medical Expenses*
05/11/2017	**Notice of Hearing** *Notice of Hearing*
05/16/2017	**Status Check** (9:00 AM) (Judicial Officer Bell, Linda Marie) *Status Check: Status of the Case* Parties Present Minutes Result: Matter Heard
06/02/2017	**Opposition** *Defendant's Opposition to Plaintiff's Motion for Summary Judgment*
06/13/2017	**Motion for Partial Summary Judgment** (9:00 AM) (Judicial Officer Bell, Linda Marie) *Plaintiff's Motion for Partial Summary Judgment Regarding Plaintiff's Past Medical Expenses* Parties Present Minutes Result: Granted
08/22/2017	**Reporters Transcript** *Court Reporters transcript of Proceedings - June 13, 2017*
08/29/2017	**Calendar Call** (9:00 AM) (Judicial Officer Bell, Linda Marie) Parties Present Minutes Result: Trial Date Set

08/30/2017 **Order**
Order Granting Plaintiff's Motion for Partial Summary Judgment Regarding Plaintiff's Past Medical Treatment and Expenss
08/31/2017 **Notice of Entry**
Notice of Entry of Order
09/05/2017 *CANCELED* **Jury Trial** (9:00 AM) (Judicial Officer Bell, Linda Marie)
Vacated
09/25/2017 **Pre-trial Memorandum**
Defendants David E. Lujan and Harvest Management Sub LLC's Individual Pre-Trial Memorandum
10/03/2017 **Calendar Call** (9:00 AM) (Judicial Officer Bell, Linda Marie)
Parties Present
Minutes
Result: Matter Heard
10/09/2017 *CANCELED* **Jury Trial** (9:00 AM) (Judicial Officer Bell, Linda Marie)
Vacated
10/31/2017 **Brief**
Plaintiff's Bench Regarding Demonstrative Exhibits
10/31/2017 **Brief**
Plaintiff's Bench Regarding the Issue of Jury Selection
11/06/2017 **Jury Trial** (9:00 AM) (Judicial Officer Bell, Linda Marie)
11/06/2017, 11/07/2017, 11/08/2017
Parties Present
Minutes
Result: Trial Continues
11/06/2017 **Jury List**
11/07/2017 *CANCELED* **Status Check** (9:00 AM) (Judicial Officer Bell, Linda Marie)
Vacated - On in Error
Status Check: Settlement Documents
11/09/2017 **Status Check** (10:30 AM) (Judicial Officer Bell, Linda Marie)
Status Check: Trial Setting
Parties Present
Minutes
Result: Matter Heard
02/08/2018 **Reporters Transcript**
Court Reporters transcript of Proceedings (Civil) - Jury Trial - Day 1
02/08/2018 **Recorders Transcript of Hearing**
Day 2 - Jury Trial - Transcript of Proceedings - 1-7-2018
02/08/2018 **Transcript of Proceedings**
Transcript of Proceedings - July Trial - Day 3
03/06/2018 **Calendar Call** (9:00 AM) (Judicial Officer Bell, Linda Marie)
Parties Present
Minutes
Result: Matter Heard
03/07/2018 **Memorandum of Costs and Disbursements**
Plaintiff's Memorandum of Costs and Disbursements
03/07/2018 **Motion for Attorney Fees and Costs**
(4/11/2018 Withdrawn) Plaintiff's Motion for Attorney Fees and Costs of Mistrial
03/08/2018 **Pre-Trial Disclosure**
Plaintiff's Supplement to Pre-Trial Disclosures and Objections Pursuant to N.R.C.P. 16.1(a)(3)
03/08/2018 **Notice of Hearing**
Notice of Hearing
03/19/2018 *CANCELED* **Motion to Strike** (9:00 AM) (Judicial Officer Gonzalez, Elizabeth)
Vacated - On in Error
Defendant Harvest Management Sub LLC's Motion to Strike Portions of Plaintiff Aaron M. Morgan's Reply in Support of Motion for Attorney;s Fees and Costs; Or in the Alternative, Motion for Leave to File Sur-Reply on Order of Shortening Time
03/26/2018 **Opposition**
Defendant's Opposition to Plaintiff's Motion for Attorney Fees and Costs of Mistrial
03/27/2018 **Motion**
Plaintiff's Motion to Present a Jury Questionnaire Prior to Voir Dire or In the Alternative for More Liberal Jury Selection on Order Shortening Time
03/27/2018 **Receipt of Copy**
Receipt of Copy - Plaintiff's Motion to Present a Jury Questionnaire Prior to Voir Dire or In the Alternative for More Liberal Jury Selection on Order Shortening Time
03/30/2018 **Trial Brief**
Plaintiff's Trial Brief
04/02/2018 **Jury Trial - FIRM** (9:00 AM) (Judicial Officer Bell, Linda Marie)
04/02/2018, 04/03/2018, 04/04/2018, 04/05/2018, 04/06/2018, 04/09/2018
Parties Present
Minutes
Result: Trial Continues
04/02/2018 **Motion** (9:00 AM) (Judicial Officer Bell, Linda Marie)
Plaintiff's Motion to Present a Jury Questionnaire Prior to Voir Dire or In the Alternative for More Liberal Jury Selection on Order Shortening Time
Result: Denied
04/03/2018 **Jury List**
04/04/2018 **Reporters Transcript**
Court Reporters transcript of Proceedings (Civil) - Defense Opening - 4-3-2018
04/09/2018 **Amended Jury List**
04/09/2018 **Special Jury Verdict**
04/09/2018 **Jury Instructions**
04/10/2018 **Motion for Attorney Fees and Costs** (9:00 AM) (Judicial Officer Bell, Linda Marie)
04/10/2018, 05/24/2018

Plaintiff's Motion for Attorney Fees and Costs of Mistrial

Minutes

Result: Matter Continued

04/11/2018 **Notice**
Notice of Plaintiff's Withdrawal of Motion

04/26/2018 **Substitution of Attorney**
Substitution of Attorneys

04/26/2018 **Errata**
Errata to Substitution of Attorneys

05/09/2018 **Reporters Transcript**
Court Reporters transcript of Proceedings (Civil) 4-2-2018 - Jury Trial

05/09/2018 **Recorders Transcript of Hearing**
Recorder's Transcript of Jury Trial - 4-3-2018

05/09/2018 **Recorders Transcript of Hearing**
Recorder's Transcript of Jury Trial - 4-4-2018

05/09/2018 **Reporters Transcript**
Recorder's Transcript of Jury Trial -4-5-2018

05/09/2018 **Recorders Transcript of Hearing**
Recorder's Transcript of Jury Trial - 4-6-2018

05/09/2018 **Recorders Transcript of Hearing**
Recorder's Transcript of Jury Trial - 4-9-2018

06/06/2018 **Stipulation and Order**
Stipulation and Order To Vacate Hearing on Plaintiff's Motion for Attorney Fees and Cost of Mistrial Filed on March 7, 2018

06/06/2018 **Notice of Entry of Order**
Notice of Entry of Order

06/29/2018 **Order to Statistically Close Case**
Civil Order to Statistically Close Case

07/02/2018 **Case Reassigned to Department 11**
Reassigned From Judge Bell - Dept 7

07/30/2018 **Notice of Appearance**
Notice of Appearance

07/30/2018 **Motion for Entry of Judgment**
Plaintiff's Motion for Entry of Judgment

08/06/2018 **Notice of Change of Hearing**
Notice of Change of Hearing

08/16/2018 **Appendix**
Appendix of Exhibits to Defendant Harvest Management Sub LLC's Opposition to Plaintiff's Motion for Entry of Judgment - Volume 1 of 4

08/16/2018 **Appendix**
Appendix of Exhibits to Defendant Harvest Management Sub LLC's Opposition to Plaintiff's Motion for Entry of Judgment - Volume 2 of 4

08/16/2018 **Appendix**
Appendix of Exhibits to Defendant Harvest Management Sub LLC's Opposition to Plaintiff's Motion for Entry of Judgment - Volume 3 of 4

08/16/2018 **Appendix**
Appendix of Exhibits to Defendant Harvest Management Sub LLC's Opposition to Plaintiff's Motion for Entry of Judgment - Volume 4 of 4

08/16/2018 **Opposition**
Defendant Harvest Management Sub LLC's Opposition to Plaintiff's Motion for Entry of Judgment

09/07/2018 **Reply in Support**
Plaintiff's Reply in Support of Motion for Entry of Judgment

11/06/2018 **Motion for Judgment** (9:00 AM) (Judicial Officer Gonzalez, Elizabeth)
Plaintiff's Motion for Entry of Judgment

Parties Present

Minutes

09/14/2018 Reset by Court to 09/20/2018

09/20/2018 Reset by Court to 11/06/2018

Result: Motion Denied

11/28/2018 **Order**
Order on Plaintiffs' motion for Entry of Judgment

11/28/2018 **Notice of Entry of Order**
Notice of Entry of Order on Plaintiff's Motion for Entry of Judgment

12/17/2018 **Judgment on Jury Verdict**
Judgment Upon the Jury Verdict

12/18/2018 **Memorandum of Costs and Disbursements**
Plaintiff's Verified Memorandum of Costs

12/18/2018 **Notice of Appeal**
Notice of Appeal

12/18/2018 **Case Appeal Statement**
Case Appeal Statement

12/20/2018 **Objection**
Defendant Harvest Management Sub LLC's Limited Objection to Plaintiff's Verified Memorandum of Costs

12/21/2018 **Motion for Entry of Judgment**
Defendant Harvest Management Sub LLC's Motion for Entry of Judgment

12/21/2018 **Appendix**
Appendix of Exhibits to Defendant Harvest Management Sub LLC's Motion for Entry of Judgment - Volume 1 of 4

12/21/2018 **Appendix**
Appendix of Exhibits to Defendant Harvest Management Sub LLC's Motion for Entry of Judgment - Volume 2 of 4

12/21/2018 **Appendix**
Appendix of Exhibits to Defendant Harvest Management Sub LLC's Motion for Entry of Judgment - Volume 3 of 4

12/21/2018 **Appendix**
Appendix of Exhibits to Defendant Harvest Management Sub LLC's Motion for Entry of Judgment - Volume 4 of 4

01/02/2019 **Notice of Entry of Judgment**
Notice of Entry of Judgment

01/09/2019 **Stipulation and Order**

Stipulation and Order to Extend Deadlines for Opposition and Reply to Motion for Entry of Judgment

01/10/2019 **Notice of Entry of Stipulation and Order**
Notice of Entry of Stipulation and Order to Extend Deadlines for Opposition and Reply to Motion for Entry of Judgment

01/15/2019 **Opposition and Countermotion**
Opposition to Defendant Harvest Management Sub LLC's Motion for Entry of Judgment and Counter-Motion to Transfer Case Back to Chief Judge Bell for Resolution of Post-Verdict Issues

01/18/2019 **Transcript of Proceedings**
Transcript of Proceedings: Hearing on Plaintiff's Motion for Entry of Judgment

01/22/2019 **Motion for Attorney Fees and Costs**
Plaintiff's Motion for Attorney's Fees and Costs

01/23/2019 **Reply in Support**
Reply in Support of Defendant Harvest Management Sub LLC's Motion for Entry of Judgment; and Opposition to Plaintiff's Counter-Motion to Transfer Case Back to Chief Judge Bell for Resolution of Post-Verdict Issues

01/25/2019 **Motion for Judgment** (3:00 AM) (Judicial Officer Gonzalez, Elizabeth)
01/25/2019, 02/19/2019, 03/05/2019
Defendant Harvest Management Sub LLC's Motion for Entry of Judgment
Parties Present
Minutes
02/12/2019 Reset by Court to 02/19/2019
02/19/2019 Reset by Court to 02/19/2019
Result: Referred

01/25/2019 **Opposition and Countermotion** (3:00 AM) (Judicial Officer Gonzalez, Elizabeth)
Opposition to Defendant Harvest Management Sub LLC's Motion for Entry of Judgment and Counter-Motion to Transfer Case Back to Chief Judge Bell for Resolution of Post-Verdict Issues
Result: Granted

01/25/2019 **All Pending Motions** (3:00 AM) (Judicial Officer Gonzalez, Elizabeth)
Minutes
Result: Minute Order - No Hearing Held

02/06/2019 **Stipulation and Order**
Stipulation and Order to Extend Briefing Schedule for Plaintiff's Motion for Attorney's Fees and Costs and to Continue Hearing on the Motion

02/07/2019 **Order**
Order Regarding Plaintiff's Counter-Motion to Transfer Case Back to Chief Judge Bell for Resolution of Post-Verdict Issues

02/07/2019 **Notice of Entry of Stipulation and Order**
Notice of Entry of Stipulation and Order to Extend Briefing Schedule for Plaintiff's Motion for Attorney's Fees and Costs and to Continue Hearing on the Motion

02/07/2019 **Notice**
Defendant Harvest Management Sub LLC's Notice of Objection and Reservation of Rights to Order Regarding Plaintiff's Counter-Motion to Transfer Case Back to Chief Judge Bell for Resolution of Post-Verdict Issues

02/07/2019 **Notice of Entry of Order**
Notice of Entry of Order Regarding Plaintiff's Counter-Motion to Transfer Case Back to Chief Judge Bell for Resolution of Post-Verdict Issues

02/07/2019 **Stipulation and Order**
Stipulation and Order to Continue Hearing on Defendant Harvest Management Sub LLC's Motion for Entry of Judgment

02/08/2019 **Notice of Entry of Stipulation and Order**
Notice of Entry of Stipulation and Order to Continue Hearing on Defendant Harvest Management Sub LLC's Motion for Entry of Judgment

02/14/2019 **Stipulation and Order**
Stipulation and Order to Extend Briefing Schedule For Plaintiff's Motion For Attorney's Fees and Costs and to Continue Hearing on the Motion (Second Request)

02/15/2019 **Notice of Entry of Stipulation and Order**
Notice of Entry of Stipulation and Order to Extend Briefing Schedule For Plaintiff's Motion For Attorney's Fees and Costs and to Continue Hearing on the Motion (Second Request)

02/19/2019 **Stipulation and Order**
Stipulation and Order to Reschedule February 19, 2019 Hearing to March 5, 2019

02/21/2019 **Notice of Entry of Stipulation and Order**
Notice of Entry of Stipulation and Order to Reschedule February 19, 2019 Hearing to March 5, 2019

02/22/2019 **Opposition**
Defendant Harvest Management Sub LLC's Opposition to Plaintiff's Motion for Attorney's Fees and Costs

02/22/2019 **Opposition**
Defendant's Opposition to Motion for Attorneys Fees

03/05/2019 **Supplement**
Supplement to Harvest Management Sub LLC's Motion for Entry of Judgment

03/06/2019 **Objection**
Plaintiff's Objection to Supplement to Harvest Management Sub LLC's Motion for Entry of Judgment

03/06/2019 **Response**
Defendant Harvest Management Sub LLC's Response to Plaintiff's Objection to Supplement to Harvest Management Sub LLC's Motion for Entry of Judgment

03/08/2019 **Reply**
Plaintiff's Reply in Support of Motion for Attorney's Fees and Costs

03/13/2019 **Motion to Strike**
Defendant Harvest Management Sub LLC's Motion to Strike Portions of Plaintiff Aaron M. Morgan's Reply in Support of Motion for Attorney's Fees and Costs; or, in the Alternative, Motion for Leave to File Sur-Reply on Order Shortening Time

03/14/2019 **Minute Order** (2:00 PM) (Judicial Officer Bell, Linda Marie)
Minutes
Result: Minute Order - No Hearing Held

03/14/2019 **Notice of Department Reassignment**
Notice of Department Reassignment

03/19/2019 **Motion for Attorney Fees and Costs** (9:00 AM) (Judicial Officer Bell, Linda Marie)
Plaintiff's Motion for Attorney's Fees and Costs
03/01/2019 Reset by Court to 03/08/2019
03/08/2019 Reset by Court to 03/15/2019
03/15/2019 Reset by Court to 03/19/2019

03/19/2019 Reset by Court to 03/19/2019

Result: Stayed

03/19/2019 **Status Check** (9:00 AM) (Judicial Officer Bell, Linda Marie)
Status Check: Decision
Result: Matter Heard

03/19/2019 **Motion to Strike** (9:00 AM) (Judicial Officer Bell, Linda Marie)
Defendant Harvest Management Sub LLC's Motion to Strike Portions of Plaintiff Aaron M. Morgan's Reply in Support of Motion for Attorney's Fees and Costs; or, in the Alternative, Motion for Leave to File Sur-Reply on Order Shortening Time
Result: Stayed

03/19/2019 **All Pending Motions** (9:00 AM) (Judicial Officer Bell, Linda Marie)
Parties Present
Minutes
Result: Matter Heard

03/28/2019 **Reporters Transcript**
Court Recorder's transcript of Proceedings (Civil) - 3-5-19 - Bell

04/02/2019 **Status Check** (9:00 AM) (Judicial Officer Bell, Linda Marie)
STATUS CHECK: DECISION
Parties Present
Minutes
Result: Matter Heard

04/05/2019 **Decision and Order**
Deleted, wrong document attached Decision and Order

04/05/2019 **Decision and Order**
Decision and Order

04/05/2019 **Minute Order** (4:30 PM) (Judicial Officer Bell, Linda Marie)
Minutes
Result: Minute Order - No Hearing Held

04/18/2019 **Notice**
Notice of Filing Petition for Extraordinary Writ Relief

05/31/2019 **Motion for Withdrawal**
Motion for Leave to Withdraw as Counsel

06/17/2019 **Motion to Compel**
Plaintiff's Motion to Compel Response to Post-Judgment Request for Production of Documents

06/17/2019 **Clerk's Notice of Hearing**
Notice of Hearing

07/23/2019 **Motion to Compel** (9:00 AM) (Judicial Officer Bell, Linda Marie)
Plaintiff's Motion to Compel Response to Post-Judgment Request for Production of Documents
Parties Present
Minutes
Result: Granted

08/12/2019 **Order Granting Motion**
Order Granting Plaintiff's Motion to Compel Response to Post-Judgment Request for Production of Documents

08/13/2019 **Notice of Entry of Order**
Notice of Entry of Order Granting Plaintiff's Motion to Compel Response to Post-Judgment Request for Production of Documents

08/26/2019 **Motion for Attorney Fees**
Motion for Attorney Fees Pursuant to NRCP 37(a)(5)

08/26/2019 **Clerk's Notice of Hearing**
Notice of Hearing

09/23/2019 **Opposition to Motion**
Limited Opposition to Motion for Attorney's Fees

09/24/2019 **Notice**
Notice of Defendant's Failure to Oppose Plaintiff's Motion for Attorney Fees Pursuant to NRCP 37(a)(5) and Non-Compliance with Order Dated August 12, 2019

09/26/2019 **Order**
Order Setting Hearing

09/26/2019 **Notice of Entry of Order**
Notice of Entry of Order Setting Hearing

09/26/2019 **Errata**
Errata to Notice of Entry of Order Setting Hearing

10/01/2019 **Motion for Attorney Fees** (9:00 AM) (Judicial Officer Bell, Linda Marie)
Plaintiff's Motion for Attorney Fees Pursuant to NRCP 37(a)(5)
Result: Granted

10/01/2019 **Motion for Judgment** (9:00 AM) (Judicial Officer Bell, Linda Marie)
10/01/2019, 10/29/2019
Defendant Harvest Management Sub LLC's Motion for Entry of Judgement
Parties Present
Minutes
Result: Continued

10/01/2019 **All Pending Motions** (9:00 AM) (Judicial Officer Bell, Linda Marie)
Parties Present
Minutes
Result: Matter Heard

10/03/2019 **Notice of Entry of Stipulation and Order**
Notice of Entry of Stipulation and Order to Continue October 1, 2019 Hearing

10/03/2019 **Stipulation and Order**
Stipulation and Order to Continue October 1, 2019 Hearing

10/18/2019 **NV Supreme Court Clerks Certificate/Judgment - Dismissed**
Nevada Supreme Court Clerk's Certificate/Remittitur Judgment - Dismissed

10/24/2019 **Order Granting Motion**
Order Granting Plaintiff's Motion for Attorney's Fees Pursuant to NRCP 37
10/24/2019 **Notice of Entry of Order**
Notice of Entry of Order Granting Plaintiff's Motion for Attorney's Fees Pursuant to NRCP 37
11/07/2019 **Order to Withdraw as Attorney of Record**
Order Granting Motion for Leave to Withdraw as Counsel
11/12/2019 **Status Check** (9:00 AM) (Judicial Officer Bell, Linda Marie)
11/12/2019, 11/26/2019, 12/10/2019, 12/17/2019, 12/24/2019, 12/31/2019, 01/14/2020
STATUS CHECK: DECISION
Parties Present
Minutes
Result: Continued
11/13/2019 **Notice of Entry**
Notice of Entry of Order
01/03/2020 **Decision and Order**
Decision and Order
01/14/2020 **Status Check: Trial Setting** (9:00 AM) (Judicial Officer Bell, Linda Marie)
Result: Trial Date Set
01/14/2020 **All Pending Motions** (9:00 AM) (Judicial Officer Bell, Linda Marie)
Parties Present
Minutes
Result: Matter Heard
02/12/2020 **Reporters Transcript**
Court Reporters transcript of Proceedings (Civil) 3/19/2019
02/12/2020 **Reporters Transcript**
Recorder's Transcript of Paintiff's Motion for Attorney Fees Pursuant to NRCP 37(a)(5)- 10-1-19
02/12/2020 **Recorders Transcript of Hearing**
Recorder's Transcript of Hearing - 4-2-19 - Bell
02/12/2020 **Reporters Transcript**
Recorder's Transcript of Hearing - 1-14-20 - Bell
02/19/2020 **Reporters Transcript**
Reporters Transcript of Defendant Harvest Management Sub LLC's Motion For Entry of Judgment 10/29/2019
02/26/2020 **Notice of Change**
Notice of Change of Firm Affiliation
03/20/2020 **Notice**
Notice of Filing Petition for Extraordinary Writ Relief
03/23/2020 **Motion to Withdraw As Counsel**
Motion to Withdraw as Counsel of Record
03/23/2020 **Clerk's Notice of Hearing**
Clerk's Notice of Hearing
05/04/2020 **Stipulation and Order**
Stipulation and Order To Vacate Pre-Trial Deadlines and Continue Trail
05/05/2020 **Motion to Withdraw as Counsel** (10:30 AM) (Judicial Officer Bell, Linda Marie)
Motion to Withdraw as Counsel of Record
Minutes
Result: Granted
05/05/2020 **Notice of Entry of Stipulation and Order**
Notice of Entry of Stipulation and Order to Vacate Pre-Trial Deadlines and Continue Trial
05/05/2020 **Order to Withdraw as Attorney of Record**
Order Granting Motion to Withdraw as Attorney of Record
05/05/2020 **Notice of Entry of Order**
Notice of Entry of Order
06/16/2020 *CANCELED* **Calendar Call** (9:00 AM) (Judicial Officer Bell, Linda Marie)
Vacated - per Stipulation and Order
06/22/2020 *CANCELED* **Jury Trial - FIRM** (11:00 AM) (Judicial Officer Bell, Linda Marie)
Vacated
10/01/2020 **Status Check: Trial Setting** (10:30 AM) (Judicial Officer Bell, Linda Marie)
08/04/2020 Reset by Court to 09/29/2020
09/29/2020 Reset by Court to 10/01/2020

Financial Information

Defendant Harvest Management Sub LLC

	Total Financial Assessment			30.00
	Total Payments and Credits			30.00
	Balance Due as of 09/22/2020			**0.00**
06/16/2015	Transaction Assessment			30.00
06/16/2015	Efile Payment	Receipt # 2015-62947-CCCLK	Harvest Management Sub LLC	(30.00)

Defendant Lujan, David E

	Total Financial Assessment			223.00
	Total Payments and Credits			223.00
	Balance Due as of 09/22/2020			**0.00**
06/16/2015	Transaction Assessment			223.00

06/16/2015	Efile Payment	Receipt # 2015-62946-CCCLK	Lujan, David E	(223.00)

Plaintiff Morgan, Aaron M

	Total Financial Assessment			964.50
	Total Payments and Credits			964.50
	Balance Due as of 09/22/2020			**0.00**
05/20/2015	Transaction Assessment			270.00
05/20/2015	Efile Payment	Receipt # 2015-53059-CCCLK	Morgan, Aaron M	(270.00)
05/10/2017	Transaction Assessment			200.00
05/10/2017	Efile Payment	Receipt # 2017-43043-CCCLK	Morgan, Aaron M	(200.00)
05/25/2018	Transaction Assessment			371.00
05/25/2018	Payment (Window)	Receipt # 2018-35738-CCCLK	Counter Transaction	(371.00)
08/01/2018	Transaction Assessment			3.50
08/01/2018	Efile Payment	Receipt # 2018-51045-CCCLK	Morgan, Aaron M	(3.50)
09/10/2018	Transaction Assessment			3.50
09/10/2018	Efile Payment	Receipt # 2018-59708-CCCLK	Morgan, Aaron M	(3.50)
12/17/2018	Transaction Assessment			3.50
12/17/2018	Efile Payment	Receipt # 2018-82694-CCCLK	Morgan, Aaron M	(3.50)
12/18/2018	Transaction Assessment			3.50
12/18/2018	Efile Payment	Receipt # 2018-83158-CCCLK	Morgan, Aaron M	(3.50)
12/18/2018	Transaction Assessment			27.50
12/18/2018	Efile Payment	Receipt # 2018-83174-CCCLK	Morgan, Aaron M	(27.50)
12/19/2018	Transaction Assessment			5.00
12/19/2018	Payment (Window)	Receipt # 2018-83318-CCCLK	Marquis Aurbach Coffing	(5.00)
01/02/2019	Transaction Assessment			3.50
01/02/2019	Efile Payment	Receipt # 2019-00078-CCCLK	Morgan, Aaron M	(3.50)
01/10/2019	Transaction Assessment			3.50
01/10/2019	Efile Payment	Receipt # 2019-01831-CCCLK	Morgan, Aaron M	(3.50)
01/10/2019	Transaction Assessment			3.50
01/10/2019	Efile Payment	Receipt # 2019-02025-CCCLK	Morgan, Aaron M	(3.50)
01/16/2019	Transaction Assessment			3.50
01/16/2019	Efile Payment	Receipt # 2019-03284-CCCLK	Morgan, Aaron M	(3.50)
01/23/2019	Transaction Assessment			3.50
01/23/2019	Efile Payment	Receipt # 2019-04852-CCCLK	Morgan, Aaron M	(3.50)
02/07/2019	Transaction Assessment			3.50
02/07/2019	Efile Payment	Receipt # 2019-08188-CCCLK	Morgan, Aaron M	(3.50)
02/07/2019	Transaction Assessment			3.50
02/07/2019	Efile Payment	Receipt # 2019-08414-CCCLK	Morgan, Aaron M	(3.50)
02/20/2019	Transaction Assessment			3.50
02/20/2019	Efile Payment	Receipt # 2019-11108-CCCLK	Morgan, Aaron M	(3.50)
02/21/2019	Transaction Assessment			3.50
02/21/2019	Efile Payment	Receipt # 2019-11268-CCCLK	Morgan, Aaron M	(3.50)
03/06/2019	Transaction Assessment			3.50
03/06/2019	Efile Payment	Receipt # 2019-14409-CCCLK	Morgan, Aaron M	(3.50)
03/08/2019	Transaction Assessment			3.50
03/08/2019	Efile Payment	Receipt # 2019-15155-CCCLK	Morgan, Aaron M	(3.50)
06/17/2019	Transaction Assessment			3.50
06/17/2019	Efile Payment	Receipt # 2019-36738-CCCLK	Morgan, Aaron M	(3.50)
08/12/2019	Transaction Assessment			3.50
08/12/2019	Efile Payment	Receipt # 2019-49274-CCCLK	Morgan, Aaron M	(3.50)
08/13/2019	Transaction Assessment			3.50
08/13/2019	Efile Payment	Receipt # 2019-49371-CCCLK	Morgan, Aaron M	(3.50)
08/26/2019	Transaction Assessment			3.50
08/26/2019	Efile Payment	Receipt # 2019-52315-CCCLK	Morgan, Aaron M	(3.50)
09/24/2019	Transaction Assessment			3.50
09/24/2019	Efile Payment	Receipt # 2019-58473-CCCLK	Morgan, Aaron M	(3.50)
10/03/2019	Transaction Assessment			3.50
10/03/2019	Efile Payment	Receipt # 2019-60322-CCCLK	Morgan, Aaron M	(3.50)
10/03/2019	Transaction Assessment			3.50
10/03/2019	Efile Payment	Receipt # 2019-60409-CCCLK	Morgan, Aaron M	(3.50)
10/24/2019	Transaction Assessment			3.50
10/24/2019	Efile Payment	Receipt # 2019-64935-CCCLK	Morgan, Aaron M	(3.50)
10/24/2019	Transaction Assessment			3.50
10/24/2019	Efile Payment	Receipt # 2019-64936-CCCLK	Morgan, Aaron M	(3.50)
03/23/2020	Transaction Assessment			3.50
03/23/2020	Efile Payment	Receipt # 2020-17223-CCCLK	Morgan, Aaron M	(3.50)
05/05/2020	Transaction Assessment			3.50
05/05/2020	Efile Payment	Receipt # 2020-23683-CCCLK	Morgan, Aaron M	(3.50)