Case No. 81975

IN THE SUPREME COURT OF NEVADA

AARON M. MORGAN,
Petitioner,

vs.

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

- and -

HARVEST MANAGEMENT SUB LLC; AND DAVID E. LUJAN,
Real Parties in Interest.

District Court Case No. A-15-718679-C, Department VII

ANSWER TO PETITION FOR EXTRAORDINARY WRIT RELIEF

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January 27, 2021

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IN THE SUPREME COURT OF THE STATE OF NEVADA

AARON M. MORGAN, Petitioner, vs. EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE LINDA MARIE BELL, Respondents, and HARVEST MANAGEMENT SUB LLC; and DAVID E. LUJAN, Real Parties in Interest.	Supreme Court No. 81975 District Court No. A-15-718679-C **NRAP 26.1 DISCLOSURE**

NRAP 26.1 DISCLOSURE

Pursuant to Nevada Rule of Appellate Procedure 26.1, Real Party in Interest 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 Answer to Petition for Extraordinary Writ Relief.

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

DATED this 27th day of January, 2021.

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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 27th day of January, 2021, 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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PETITION FOR EXTRAORDINARY WRIT RELIEF

I. INTRODUCTION

A trial of Petitioner Aaron M. Morgan's ("Morgan") claims was held in April 2018. Whether as an intentional trial strategy or the negligent conduct of his counsel, Morgan completely abandoned his claim against Real Party in Interest Harvest Management Sub LLC ("Harvest") at trial. Specifically, he:

- Never referenced Harvest or any claim alleged against Harvest in his introductory remarks to the jury, voir dire, or his opening statement;
- Failed to offer any evidence regarding Harvest's liability for his damages;
- Never referenced Harvest or his claim against Harvest in his closing argument;
- Failed to offer any jury instructions regarding a claim against Harvest; and
- Failed to include Harvest or any claim against Harvest in the Special Verdict Form.

Thus, the jury rendered a verdict solely against Real Party in Interest David E. Lujan ("Lujan") on the sole claim of negligence.

Three months after the jury rendered its verdict, Morgan — perhaps regretting his trial strategy, or in recognition of his counsel's error — sought to "fix" the jury's verdict and impose liability where none has been proven to exist

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by seeking entry of judgment against Harvest pursuant to NRCP 49(a). The District Court properly denied Morgan's motion.

Morgan never sought reconsideration or rehearing of this motion. Rather, he filed a premature appeal. Upon dismissal of his appeal, Morgan waited another year before filing his Petition for Writ of Mandamus or Prohibition ("Petition") relating to the denial of his motion.

Harvest respectfully requests that this Court deny Morgan's Petition in its entirety for the following reasons addressed herein:

- The Order Morgan seeks relief from does not pertain to his request for entry of judgment pursuant to NRCP 49(a);
- Morgan did not timely seek extraordinary writ relief;
- Morgan failed to show that an appeal is an inadequate remedy;
- Morgan failed to establish that NRCP 49(a) is ambiguous and, thus, presents an important issue of law in need of clarification;
- Morgan failed to demonstrate that the District Court manifestly abused its discretion in denying relief pursuant to NRCP 49(a);
- Morgan failed to object to the verdict form at trial and is estopped from now asserting that the verdict form contained any errors;
- Morgan failed to offer any evidence at trial to support a judgment against Harvest on the claim of vicarious liability; and
- Morgan improperly raises arguments in his Petition which were never asserted in the District Court.

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II. STATEMENT OF FACTS NECESSARY TO UNDERSTAND THE ISSUES PRESENTED

A. The Accident.

On April 1, 2014, Morgan and Lujan were involved in a traffic accident as Lujan exited a park located in Las Vegas. (12P.A. at 1867:8-13.)[1] Morgan alleged that he injured his head, spine, wrists, neck, and back as a result of the accident. (*Id.* at 1867:14-17.)

B. Harvest Was Sued for Negligent Entrustment.

On May 20, 2015, Morgan filed a Complaint against Lujan and Harvest. (1P.A. at 2-5.) He alleged claims for negligence and negligence *per se* against Lujan. (*Id.* at 4:1-18.) The sole claim alleged against Harvest was captioned "Vicarious Liability/Respondeat Superior"; however, the supporting allegations clearly recite the elements of a claim for ***negligent entrustment*** — not vicarious liability. (*Id.* at 4:19-5:12 (repeatedly alleging that Harvest negligently entrusted its vehicle to Lujan who was allegedly an inexperienced, incompetent, or reckless driver).) In fact, the only reference to "course and scope of

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[1] For citations to the Petitioner's Appendix, the number preceding "P.A." refers to the volume of the Appendix.

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employment" in the Complaint is in a very general, conclusory, nonsensical paragraph which also refers to negligent entrustment. (*Id.* at 3, at ¶ 9.)

Despite his failure to allege a claim for vicarious liability, Morgan contended, ***after the trial***, that this was the claim he tried to the jury. (12P.A. at 1867:24-25.)

C. <u>Harvest Denied the Allegations in Morgan's Complaint.</u>

In its Answer, Harvest admitted that it employed Lujan as a driver, that it owned the vehicle involved in the accident, and that it had entrusted control of the vehicle to Lujan. (1P.A. at 9:7-8.) However, Harvest denied the remaining allegations of Morgan's claim for negligent entrustment. (*Id.* at 9:9-10.) Moreover, Harvest denied the allegations in the general, conclusory, and nonsensical paragraph which generically referred to "course and scope of employment." (*Id.* at 8:8-9.)

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

Morgan conducted no discovery relating to vicarious liability; rather, discovery focused solely on his claim for negligent entrustment. Specifically, Morgan propounded interrogatories which sought information about: (1) the background checks that Harvest performed prior to hiring Lujan; and (2) any

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disciplinary actions (relating to the operation of a motor vehicle) that Harvest had taken against Lujan in the five years preceding the accident with Morgan. (1P.A. at 19:25-20:2, 20:15-19.) There were no interrogatories propounded upon Harvest which related to whether Lujan was acting within the course and scope of his employment at the time of the accident.

In response to the interrogatory relating to background checks on Lujan, Harvest detailed the pre-employment drug test, criminal background check, motor vehicle record screening, previous employer inquiry, and medical certification that it conducted. (1P.A. at 25:2-19.) Further, in response to the interrogatory relating to disciplinary actions taken against Lujan, Harvest's responded: "None." (*Id.* at 26:17-24.)

Morgan did not conduct any other discovery relating to Harvest. In fact, Morgan never even deposed an officer, director, employee, or other representative of Harvest.

E. <u>The First Trial of This Action.</u>

The first trial in this case was held in November 2017. (2P.A. at 44-210; 3P.A. at 211-377; 4P.A. at 378-503; 5P.A. at 504-672.) Lujan provided important testimony at this trial which would be read into evidence during the subsequent trial:

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- Lujan confirmed the undisputed fact that he was employed as a bus driver by Montara Meadows, and that Harvest was the corporate office for Montara Meadows, (5P.A. at 611:24-612:8);

- He provided unrebutted testimony that he had never been in an accident in a bus before, (*id.* at 614:16-24, 615:8-10); and

- In response to a question from a juror, Lujan provided undisputed evidence that he was on his lunch break at the time of the accident, (*id.* at 635:22-636:2).

The first trial ended prematurely in a mistrial, when defense counsel inquired about a pending DUI charge against Morgan. (*Id.* at 653:15-655:14, 669:12-18.)

F. <u>The Second Trial of This Action.</u>

The second trial of this action was held from April 2, 2018 to April 9, 2018. (6P.A. at 673-948; 7P.A. at 949-1104; 8P.A. at 1105-1258; 9P.A. at 1259-1438; 10P.A. at 1439-1647; 11P.A. at 1648-1815.) Throughout this trial, there was a complete lack of reference to Harvest as a party or to any claim against Harvest. No evidence was offered to prove a claim against Harvest, and no claim against Harvest was presented to the jury for determination.

1. <u>The Introductory Remarks to the Jury.</u>

When the District Court requested that defense counsel identify themselves to the jury, they referred only to their client "Erica" and did not

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identify Harvest or Lujan.[2] (6P.A. at 689:14-18.) In response, Morgan did not object or inform the jury that Erica was there on behalf of Harvest, the corporate defendant who employed Lujan. (*Id.* at 689:19-21.)

Similarly, when the prospective jurors were asked whether they knew any of the parties or their counsel, there was no mention of Harvest — only Lujan was referenced as a party. (*Id.* at 697:7-14.) Again, Morgan did not object to the failure to identify Harvest as a defendant. (*Id.* at 697:15-22.)

2. Voir Dire and Opening Statements.

During voir dire, Morgan failed to reference Harvest, a corporate defendant, corporate liability, negligent entrustment, or vicarious liability. (*Id.* at 705:2-765:22, 769:6-860:21, 863:7-940:12; 7P.A. at 951:24-1009:24, 1015:16-1058:21.)[3] Morgan also failed to discuss any of these topics in his

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[2] Lujan chose not to attend the second trial. Defense counsel's reference to "Erica," refers to Erica Janssen ("Janssen"), the corporate representative for Harvest. (6P.A. at 766:19-767:10.)

[3] Morgan contends that both parties "discussed theories regarding corporate defendants during voir dire." (Pet. at 5:16-19 (citing 18P.A. at 2803).) Morgan completely misrepresents the record. The page of the trial transcript cited by Morgan contains no questions relating to corporate liability. (18P.A. at 2803.) Moreover, at no time during jury selection did either party ask any questions relating to corporate defendants or corporate liability. (6P.A. at 705:2-765:22, 769:6-860:21, 863:7-940:12; 7P.A. at 951:24-1009:24, 1015:16-1058:21.) In fact, the only reference to corporate defendants during jury selection came from the jury venire's spontaneous responses to questions unrelated to corporate defendants or corporate liability. (6P.A. at 884:25-888:9, 903:24-905:3.)

opening statement. (7P.A. at 1074:7-1093:17.) However, Morgan did state during his opening statement that Lujan was at the park having lunch when the accident occurred. (*Id.* at 1074:15-25.)

3. Morgan Failed to Offer Evidence to Prove Any Claim Alleged Against Harvest.

On the fourth day of the trial, Morgan called Janssen, the Rule 30(b)(6) representative for Harvest, as a witness during his case in chief. (9P.A. at 1422:13-23.) Janssen confirmed that the accident occurred as Lujan exited a park after having his lunch break. (*Id.* at 1426:15-20.) However, Morgan never asked Janssen what Lujan's duties were as an employee of Harvest; whether Lujan had ever been in an accident in the bus before; whether Harvest had checked Lujan's driving history prior to hiring him; where Lujan was going as he exited Paradise Park; whether Lujan was transporting any passengers at the time of the accident;[4] whether Lujan was authorized to drive the bus while on a lunch break; whether Lujan had to clock-in and clock-out during the work day; or any other questions that might have elicited evidence to support a claim for negligent entrustment or vicarious liability. (*Id.* at 1423:7-1435:17; 10P.A. at

[4] It should be noted that despite the lack of evidence on this issue, Morgan's counsel stated, during his closing argument, that there were no passengers on the bus at the time of the accident. (11P.A. at 1771:17 ("Aren't we lucky that there weren't other people on the bus?").)

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1441:2-1444:1.) Rather, Morgan's trial strategy seemed to focus almost exclusively on proving the extent of his injuries and the amount of his damages. (8P.A., at 1124:18-1250:20; 9P.A. at 1262:5-1436:10; 10P.A. at 1441:2-1493:7; 11P.A. at 1767:24-25.)

During the defense's case in chief, defense counsel read portions of Lujan's testimony from the first trial into the record. (10P.A. at 1633:7-1641:12.) As stated in Section II(E), *supra*, this testimony included that: (i) Lujan was a bus driver for Montara Meadows; (ii) Harvest was the "corporate office" for Montara Meadows; (iii) the accident occurred when Lujan was leaving the park; and (iv) Lujan had never been in an accident in the bus before. (*Id.* at 1633:8-17, 1633:25-1634:10, 1634:19-24, 1635:8-10.) This testimony, coupled with Janssen's testimony that 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 a pled (or unpled) claim against Harvest.

4. Jury Instructions.

No jury instructions were offered pertaining to vicarious liability, actions within the course and scope of employment, negligent entrustment, or corporate liability. (12P.A. at 1816-1855.) In fact, Morgan never even proposed that such instructions be given to the jury. (10P.A. at 1539:1-1544:25.)

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5. Revisions to the Special Verdict Form.

On the last day of trial, the District Court provided the parties with a sample verdict form that the District Court had used in its last car accident trial. (11P.A. at 1652:20-1653:1.) Later that day, Morgan's counsel informed the District Court that he only wanted to make one change to the proposed form:

> MR. BOYACK [MORGAN'S COUNSEL]: 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 1763:11-23 (emphasis added).) Thus, the final draft of the verdict approved by Morgan's counsel ("Special Verdict Form"):

- Asks the jury to determine only whether the "Defendant" was "negligent," (12P.A. at 1856:17);

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- Does not ask the jury to consider whether Harvest was liable for anything, (*id.* at 1856-1857); and

- Directs the jury to apportion fault only between "Defendant" and Plaintiff, with the percentage of fault totaling 100 percent, (*id.* at 1857:1-4).

6. Closing Arguments.

Finally, in closing arguments, Morgan never mentioned Harvest, negligent entrustment, or even vicarious liability. (11P.A. at 1768:5-1783:19, 1804:13-1808:10.) Further — in perhaps the clearest example of Morgan's decision to abandon his claim against Harvest — 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 [Morgan] had the right of way, said that [Morgan] didn't do anything wrong. That's what the testimony is. . . . So was Plaintiff negligent? That's [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 1771:20-1772:6.) At no point did Morgan's counsel inform the District Court that the Special Verdict Form contained errors, that it only referred to one

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defendant, that Harvest had been mistakenly omitted, or that Morgan's claim against Harvest had been omitted.

7. The Verdict.

On April 9, 2018, the jury rendered a verdict against Lujan 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. (12P.A. at 1857:6-15.)

G. Morgan's Motion for Entry of Judgment Was Denied.

On July 2, 2018, this action was reassigned to the Honorable Elizabeth Gonzalez for resolution of post-trial matters. (12P.A. at 1861; 25P.A. at 3901:10.) Thereafter, on July 30, 2018 — over three months after the trial concluded — Morgan filed a Motion for Entry of Judgment seeking to extend the jury's verdict to Harvest. (12P.A. at 1865-1871.)

For the first time, Morgan asserted that his claim against Harvest was for vicarious liability (not negligent entrustment). (*Id.* at 1867:24-25.) Morgan also argued that the verdict contained a simple "clerical error" that could be remedied by NRCP 49(a). (*Id.* at 1866:24-1869:67, 1870:7-11.) In its Opposition, Harvest demonstrated that its omission from the Special Verdict Form was not a simple clerical error — it had been omitted from the entire trial. (*Id.* at 1922:13-1940:11.) Harvest also demonstrated that NRCP 49(a) could

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not be used to determine the ultimate issue of its liability. (*Id.* at 1940:12-1943:2.)

On November 28, 2018, Judge Gonzalez denied Morgan's Motion for Entry of Judgment. (18P.A. at 2850-2854.) Based on the lack of any jury instructions pertaining to vicarious liability or negligent entrustment, the District Court determined that there was nothing to support the assertion that a claim against Harvest had been submitted to the jury for determination. (*Id.* at 2847:8-21.) Morgan never moved for reconsideration of this decision.

H. Morgan's Appeal.

On December 18, 2018, Morgan filed a Notice of Appeal from the Order denying his Motion for Entry of Judgment and from the Judgment against Lujan. (*Id.* at 2855-2857; *see also* 18P.A. at 2850-2854; 24P.A. at 3733-3735.) Harvest filed a Motion to Dismiss the premature appeal. (25P.A. at 3783-3791; 26P.A. at 3977; 27P.A. at 4127-4137[5].) In response, Morgan filed a Motion to Remand Pursuant to NRAP 12A and asserted, in part, that that the case should be remanded so that the District Court could enter judgment against Harvest pursuant to NRCP 49(a)(3). (R.P.A.1[6] at 7-8.)

[5] Harvest renewed its Motion after the parties' mandatory mediation proved unsuccessful.

[6] "R.P.A." refers to the Real Party in Interest's Appendix filed contemporaneously with this Answer. The number following R.P.A. refers to

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On July 31, 2019, this Court denied Morgan's Motion for Remand. (R.P.A.2, at 30 (citing NRCP 49(a) and *Kinnel v. Mid-Atlantic Mausoleums, Inc.*, 850 F.2d 958 (3rd Cir. 1988)).) On September 17, 2019, this Court also entered an Order Dismissing Appeal, finding that no final judgment had been entered by the District Court. (27P.A. at 4277-4278.)

I. Harvest's Motion for Entry of Judgment.

On December 21, 2018, Harvest filed a Motion for Entry of Judgment in its favor. (18P.A. at 2864-2884.) Harvest asserted that judgment should be entered in Harvest's favor because Morgan voluntarily abandoned his claim against Harvest and, as Judge Gonzalez had already determined, chose not to present his claim to the jury for determination. (*Id.* at 2877:20-2878:25.)

In his Opposition, Morgan did not reassert that Rule 49(a) permitted the District Court to enter judgment against Harvest. (24P.A. at 3743-3760.) Rather, Morgan, unhappy with Judge Gonzalez's decision on his Motion for Entry of Judgment, filed a wholly ungrounded counter-motion to transfer the case back to Chief Judge Bell. (*Id.* at 3752:11-3753:17.)

On February 7, 2019, Judge Gonzalez transferred Harvest's Motion for Entry of Judgment to Chief Judge Bell for determination while retaining

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the tab number.

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jurisdiction over the remainder of the case. (25P.A. at 3922:26-3923:5.) However, on March 14, 2019, Chief Judge Bell unilaterally transferred the entire action back to herself. (26P.A. at 3961:14-3962:5; *Id.* at 3978.)[7]

On April 5, 2019, Chief Judge Bell issued a Decision and Order stating that: (i) she did not have jurisdiction over the action (due to Morgan's appeal, which was still pending at the time); and (ii) if this Court remanded the action, she intended to reconvene the jury to correct the "error" in the Special Verdict Form. (*Id.* at 3997:16-21.)

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

On April 18, 2019, in response to the Chief Judge Bell's expressed intent to reconvene the jury to decide the claim of vicarious liability, Harvest filed a Petition for Extraordinary Writ Relief. (*Id.* at 4003-4124.) On May 15, 2019, this Court denied the Petition, without prejudice, and confirmed that the District Court lacked jurisdiction or authority to reconvene a jury once it has been dismissed. (*Id.* at 4125-4126.)

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[7] Judge Gonzalez's and Chief Judge Bell's transfer orders were inexplicable and erroneous, and Harvest reserves its right to raise these issues on appeal, if and when appropriate.

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K. Harvest's Motion for Entry of Judgment Was Denied.

On October 29, 2019, during a hearing on Harvest's Motion for Entry of Judgment, the District Court continued to suggest reconvening the jury to determine vicarious liability. (27P.A. at 4279-4283.) As an alternative to this proposal, Morgan, for the first time, proposed that Chief Judge Bell was not bound by Judge Gonzalez's decision and could enter judgment against Harvest pursuant to NRCP 49(a). (*Id.* at 4281:24-4282:10.) The District Court did not respond to this proposal. (*Id.* at 4282:13-4283:1.) Rather, Harvest's Motion for Entry of Judgment was taken under advisement for several months, and on January 3, 2020, a Decision and Order was entered: (i) denying Harvest's Motion for Entry of Judgment; and (ii) ordering a "separate trial on the issue of Harvest's vicarious liability" pursuant to NRCP 42(b). (*Id.* at 4284:18-20.)

To the extent that Morgan's proposal to utilize NRCP 49(a) was a renewed request for entry of judgment in his favor, the Decision and Order was silent as to Morgan's untimely request for rehearing or reconsideration. (*Id.* at 4284-4294.) Morgan did not (i) submit a separate proposed order memorializing the denial of his renewed request; (ii) file a motion for clarification of the Decision and Order with regard to his request; or (iii) submit a nunc pro tunc order memorializing the denial of his renewed request.

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III. REASONS WHY A WRIT SHOULD NOT BE ISSUED

A. Writ Relief Is Not Appropriate.[8]

1. Mr. Morgan Never Sought Rehearing or Reconsideration of His Request for Relief Pursuant to NRCP 49(a).

Although unclear from the Petition, it appears that Chief Judge Bell's January 3, 2020 Decision and Order denying Harvest's Motion for Entry of Judgment is the Order being challenged by Morgan. (Pet. at 1:11-14[9] (citing 27P.A. at 4284-4294), 18:5-7 (citing 24P.A. at 3752-3758).) However, Morgan's Opposition to Harvest's Motion for Entry of Judgment never sought relief pursuant to NRCP 49(a). (24P.A. at 3743-3760 (arguing only that Harvest was estopped from seeking entry of judgment because it had opposed Harvest's Motion for Entry of Judgment pursuant to NRCP 49(a).) Moreover, the January 3, 2020 Decision and Order is also silent as to NRCP 49(a). (27P.A. at 4284-4294.)[10]

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[8] Writ relief is also inappropriate in this instance because Morgan failed to provide the District Court with Notice of the filing of his Petition, as required by NRAP 21(a)(1).

[9] Although Morgan's Petition is not on line-numbered pleading paper, Harvest has attempted to cite to specific page and line numbers in this Answer for ease of reference.

[10] Notably, Morgan fails to cite to any specific portion of his Opposition to Harvest's Motion for Entry of Judgment or the January 3, 2020 Decision and Order which relates to either a renewed request for entry of judgment pursuant to NRCP 49(a) or a denial of such a renewed request. (Pet. at 1:11-14, 18:5-7.)

During argument on Harvest's Motion, Morgan proposed relief pursuant to NRCP 49(a) as an alternative to reconvening the jury or entering judgment in favor of Harvest. (*Id.* at 4281:24-4282:10.) However, even Morgan does not contend that this brief discussion of the Rule constituted a renewed motion for entry of judgment pursuant to NRCP 49(a). (*See generally* Pet.) This is likely because such a renewed motion would violate EDCR 2.24(a) and (b). Specifically, Morgan did not seek leave of court and did not give Harvest notice of an intent to seek rehearing of his request for relief pursuant to NRCP 49(a). Moreover, the deadline for seeking reconsideration of the denial of Mr. Morgan's Motion for Entry of Judgment pursuant to NRCP 49(a) passed nearly a year before Mr. Morgan raised Rule 49 at the hearing on Harvest's Motion for Entry of Judgment. (18P.A. at 2850-2854; 27P.A. at 4281:24-4282:10.)

Therefore, the January 3, 2020 Decision and Order cannot serve as the proper basis for Morgan's Petition.

2. Morgan's Petition Is Not Timely.

If, in response to this Answer, Morgan attempts to amend his Petition to contend that he is actually seeking relief from Judge Gonzalez's denial of his Motion for Entry of Judgment, this Order would also serve as an improper basis for his Petition. Extraordinary writ relief must be timely sought. *Widdis v.*

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Second Jud. Dist. Ct. ex rel. Cnty of Washoe, 114 Nev. 1224, 1227-28, 968 P.2d 1165, 1167 (1998). Morgan waited nearly two years to seek extraordinary writ relief from the November 29, 2018 Order denying his Motion for Entry of Judgment pursuant to NRCP 49(a).[11] (18P.A. at 2850-2854.) Given the lack of urgency in filing his Petition, Morgan cannot demonstrate that writ relief is warranted.

3. The District Court Did Not Manifestly Abuse Its Discretion.

Even if this Court finds that Morgan timely filed his Petition (which he did not), the Petition must still be denied because he cannot demonstrate that the District Court manifestly abused its discretion in denying entry of judgment against Harvest. *Walker v. Second Jud. Dist. Ct. ex rel. Cnty. of Washoe*, Nev. Adv. Op. 80, 476 P.3d 1194, 1196-97 (Dec. 10, 2020). Mr. Morgan has offered no evidence that the District Court misapplied the law or that its refusal to enter judgment against Harvest was the result of bias or prejudice. *Id.* at 1197.

Rather, as set forth in more detail in Section III(C), *infra*, the plain and unambiguous language of NRCP 49(a) limits its application to unresolved issues of fact omitted from a special verdict form. Moreover, the federal courts'

[11] Moreover, Morgan's premature appeal from this Order was dismissed on September 17, 2019. (27P.A at 4277-4278.) Yet, Morgan inexplicably also waited over one year from the dismissal of this appeal to seek relief via this Petition.

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application of the virtually identical Fed. R. Civ. P. 49(a) demonstrates that the Rule cannot be utilized to decide the ultimate liability of a party for a claim that was never presented to the jury for determination. Therefore, the District Court properly denied relief pursuant to NRCP 49(a).

4. Another Plain, Speedy, and Adequate Remedy Is Available.

Morgan has failed to demonstrate that there is no plain, speedy, and adequate remedy available. *Walker*, Nev. Adv. Op. 80, 476 P.3d at 1196, 1198. Specifically, Morgan has failed to show that he will suffer an impending irreparable harm if he has to await entry of final judgment before seeking appellate review. *Id.* at 1198. The District Court has already ordered a partial re-trial of this action relating to Morgan's unpled claim of vicarious liability. If Morgan is successful on re-trial, the issues raised in this Petition are moot. If Morgan fails to prevail on the re-trial, a final judgment will be entered and Morgan can file an appeal. Even if this Court grants Harvest's related petition for extraordinary writ relief (No. 80837), and a final judgment is entered in favor of Harvest, he could still seek review of these issues on appeal. Therefore, an appeal is an adequate, available remedy.

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5. There Is No Important Issue of Law in Need of Clarification.

Finally, Morgan implies that extraordinary writ relief is warranted because his Petition "offers this [C]ourt a unique opportunity to define the precise parameters of" NRCP 49(a). (Pet. at 14:14-15:6 (internal quotation and citation omitted).) However, Morgan failed to demonstrate that NRCP 49(a) is ambiguous and that his request for entry of judgment against Harvest cannot be sufficiently resolved by review and application of the plain language of NRCP 49(a). Therefore, extraordinary writ relief is also not warranted to clarify an important issue of law.

B. Morgan's Estoppel Argument Is Inapplicable.

Morgan asserts that Harvest failed to object to, acknowledged, and/or acquiesced in the alleged "flaw" in the Special Verdict Form and, therefore, is now estopped from arguing that there were no errors in the verdict. (*Id.* at 2:18-25, 15:21-17:6.) First, Morgan never raised this argument in the District Court. (12P.A. at 1865-1871; 18P.A. at 2786-2799; 24P.A. at 3743-3760.) Thus, Morgan cannot raise this issue for the first time in this Petition. *Emerson v. Eighth Jud. Dist. Ct. ex rel. Cnty. of Clark*, 127 Nev. 672, 680, 263 P.3d 224, 229 (2011). By raising an issue here which the District Court never had the opportunity to consider, it is impossible for Morgan to demonstrate that the

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District Court manifestly abused its discretion in denying entry of judgment against Harvest pursuant to NRCP 49(a). *Walker*, Nev. Adv. Op. 80, 476 P.3d at 1196-97.

Second, this argument is patently absurd. It is *Morgan*, not Harvest, who believes there is an error in the Special Verdict Form. (12P.A. at 1866:24-1867:6, 1870:7-11.) It is *Morgan*, not Harvest, who contends that his unpled, untried claim for vicarious liability should have been included in the Special Verdict Form. (*Id.* at 1867:24-25, 18P.A. at 2798:6-11.) As the plaintiff, it is *Morgan*, not Harvest, who bore the burden of ensuring that his claim against Harvest was included in the Special Verdict Form. Harvest does not claim that the Special Verdict Form contained any errors. Rather, Harvest believes that Morgan, either voluntarily or through negligence, abandoned his claim against Harvest. (*See* Section II(F), *supra*.) Therefore, the doctrine of estoppel bars the relief sought by *Morgan* in his Petition, not any argument made by Harvest herein.

Specifically, when the District Court offered a draft of the Special Verdict Form, Morgan failed to object to the omission of Harvest or a claim for vicarious liability. (11P.A. at 1652:20-1653:1.) Similarly, when Morgan later revised the draft Special Verdict Form by requesting changes to the categories

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of damages included therein, he never requested that Harvest or a claim for vicarious liability be added to the form. (*Id.* at 1763:11-23.) Furthermore, during closing arguments, Morgan specifically instructed the jury on how to complete the Special Verdict Form, and, again, he failed to object to the omission of his claim against Harvest. (*Id.* at 1771:20-1772:6.) Even after the jury rendered its verdict, Morgan waited over three months before filing his Motion for Entry of Judgment and objecting to the so-called "error" in the Special Verdict Form. (12P.A. at 1865-1871.)

Thus, Morgan's failure to object, at any time, to the alleged error in the Special Verdict Form waives the objection and leave no issue for this Court's consideration. *Nev. State Bank v. Snowden*, 85 Nev. 19, 21, 449 P.2d 254, 255 (1969).

C. NRCP 49(a) Cannot Be Utilized to Decide a Party's Ultimate Liability for a Claim of Relief.

Morgan contends that "NRCP 49(a)(3) provides the basis for the District Court to enter judgment in favor of Morgan and against Harvest." (Pet. at 3:1-2.) Further, he asserts that Judge Gonzalez denied entry of judgment against Harvest pursuant to NRCP 49(a)(3) merely because she "was not familiar with the history of the case." (Pet. at 13:1-3.)

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First, while Judge Gonzalez was not the trial judge, her denial of Morgan's motion was not based on a lack of knowledge or understanding. Judge Gonzalez explicitly and unambiguously denied Morgan's motion because there were no jury instructions relating to negligent entrustment or vicarious liability "that would lend credence to the fact that the claims against [Harvest] were submitted to the jury." (18P.A. at 2847:8-18.)

Second, the plain and unambiguous language of NRCP 49 limits its application to "***issue[s] of fact raised by the pleadings or evidence***" which the parties omitted from special interrogatories submitted to the jury. NRCP 49(a)(3). In such circumstances, "the court may make a finding on the issue"; or, if it fails to do so, it shall be deemed "to have made a finding consistent with its judgment on the special verdict." *Id.* Here, Morgan cannot demonstrate that any issue of fact relating to an unpled, unproven claim for vicarious liability was raised in the pleadings or the evidence at trial. (*See* Sections II(B), II(F), *supra*.)

Kinnel v. Mid-Atlantic Mausoleums, Inc., 850 F.2d 958 (3rd Cir. 1988)[12] is instructive on this issue and demonstrates that the District Court properly

[12] 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).

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denied Morgan's request for entry of judgment.[13] In *Kinnel*, the plaintiff brought claims against two defendants — a corporate entity (Mid-Atlantic) 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, written interrogatories were submitted to the jury which 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. *Id*. Nonetheless, the district court entered judgment against both defendants, and the jury later determined damages against both defendants. *Id.* at 959-60.

On appeal, the Third Circuit found that the district court erred in entering judgment against Kennan. *Id.* at 960. In reversing the judgment, the Third Circuit held that Fed. R. Civ. P. 49(a) was not intended to decide the ultimate liability of a party:

> 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

[13] When this Court denied Mr. Morgan's Motion to Remand his premature appeal, it specifically cited to NRCP 49(a) and *Kinnel* as a basis for the denial of the motion. (R.P.A.2, at 30.)

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> finding that Mid-Atlantic had misrepresented commission rates to Kinnel. 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 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). Thus, Rule 49(a) cannot be used 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)).

The cases upon which Morgan himself relies are in accord with the Third Circuit in *Kinnel*. (Pet. at 18:12-19:14.) For instance, in *Ogden Food Service Corp. v. Mitchell*, 614 F.2d 1001 (5th Cir. 1980), Mitchell alleged a counterclaim for deceptive trade practices, contending that Ogden induced him to enter into an agreement by promising advantageous loans which it never intended to provide. *Id.* at 1003. The jury found that the parties had reached an

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agreement as to the loans; that the agreement required Mitchell to supply collateral and appraisals satisfactory to Ogden; and that Mitchell failed to meet this requirement. *Id.* While the element of causation was not submitted to the jury for consideration, when the judge reduced the jury's verdict to a judgment against Mitchell, it properly made an implied finding that Mitchell's failure to furnish the collateral and appraisals (not misrepresentations or deceptive trade practices) was the cause of Ogden's refusal to make the loans. *Id.*

Similarly, in *Patsy's Italian Rest., Inc. v. Banas*, 658 F.3d 254 (2d Cir. 2011), the Second Circuit Court of Appeals confirmed that Fed. R. Civ. P. 49(a) cannot be used to determine every issue the parties fail to present to the jury; rather, "'[s]pecial interrogatories must be read in conjunction with the district court's charge.'" *Id.* at 265 (quoting *Romano v. Howarth*, 998 F.2d 101, 104 (2d Cir. 1993)). Thus, where the jury was asked to determine only whether there had been an abandonment of a trademark, and not the geographic scope of such abandonment, the district court properly limited the scope of the abandonment to the locations that were the subject of the trial and declined to extend the jury's verdict to include additional locations. *Id.*

Here, the claim of vicarious liability was not submitted to the jury, and the jury made no findings as to any elements of the claim, such as the scope of

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Lujan's employment with Harvest. The District Court could, therefore, not enter judgment against Harvest pursuant to NRCP 49(a).

D. An Employment Relationship and Ownership of the Vehicle Involved in the Accident Are Insufficient to Prove Vicarious Liability.

Morgan claims that Lujan's liability for Morgan's damages should be imputed to Harvest merely because Lujan was employed as a bus driver by Harvest and was driving Harvest's bus at the time of the accident. (Pet. at 23:19-24:10.) This argument is contrary to well-settled law.

An employer is only vicariously liable for tortious conduct when "(1) the actor at issue was an employee[;] and (2) the action complained of occurred within the [course and] scope of the actor's employment." *Rockwell v. Sun Harbor Budget Suites*, 112 Nev. 1217, 1223, 925 P.2d 1175, 1179 (1996). Moreover, Nevada has adopted the "going and coming rule" which provides that the "tortious conduct by an employee in transit to or from work will not expose the employer to [r]espondeat superior liability." *Nat'l Convenience Stores, Inc. v. Fantauzzi*, 94 Nev. 655, 658, 584 P.2d 689, 691-92 (1978). While this Court has not yet specifically addressed whether an employer is vicariously liable for an employee's actions during his lunch break, other jurisdictions addressing this issue have confirmed that the "going and coming

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rule" precludes any finding of vicarious liability for tortious conduct occurring during a lunch break. *See, e.g., Halliburton Energy Servs., Inc. v. Dep't of Transp.*, 162 Cal. Rptr. 3d 752, 759 (Cal. Ct. App. 2013); *Richardson v. Glass*, 835 P.2d 835, 838 (N.M. 1992).

Here, Morgan failed to prove that Lujan was acting in the course and scope of his employment with Harvest at the time of the accident because it was undisputed that Lujan was on his lunch break when the accident occurred. (9P.A. at 1426:15-20; 10P.A. at 1633:25-1634:10.) While this Court has not yet addressed which party bears the burden of proof on a claim for vicarious liability, the Nevada Court of Appeals recently held in an unpublished disposition that the ***plaintiff*** must prove both elements of the claim. *Kaye v. JRJ Invs., Inc., d/b/a BMW of Las Vegas*, No. 74324-COA, 2018 WL 6133883 at *1 (Nev. Ct. App. Nov. 20, 2018). This is consistent with the majority of other jurisdictions which have addressed this issue. *See, e.g., Montague v. AMN Healthcare, Inc.*, 168 Cal. Rptr. 3d 123, 126 (Cal. Ct. App. 2014); *Sutton v. Byer Excavating, Inc.*, 271 P.3d 169, 171-72 (Utah Ct. App. 2012); *Baker v. Saint Francis Hosp.*, 126 P.3d 602, 607 (Okla. 2005); *Doe v. Forrest*, 853 A.2d 48, 54 (Vt. 2004).

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Even in the minority of jurisdictions which do not place the burden of proof for the elements of a respondeat-superior claim on the plaintiff — and instead apply a rebuttable presumption regarding the course and scope of employment — evidence implicating the "going and coming rule" is sufficient to shift the burden of proof ***back to the plaintiff*** to prove vicarious liability. For instance, in *Gant v. Dumas Glass & Mirror, Inc.*, 935 S.W.2d 202 (Tex. App. 1996), a vehicle owned by Dumas Glass was being driven by its employee, Mr. Banks, when an accident occurred with Mr. Gant. *Id.* at 204-05. Mr. Gant sued Mr. Banks for negligence and Dumas Glass for vicarious liability. *Id.* at 205. The court analyzed the issue of vicarious liability as follows:

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

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Id. at 212 (emphasis added) (internal quotations omitted); *see also Matheson v. Braden*, 713 S.E.2d 723, 727 (Ga. Ct. App. 2011) (holding that "[a]ny presumption raised by the fact that the employee was driving his employer's vehicle at the time of the collision was overcome as a matter of law through the employer's ***positive and uncontradicted testimony*** that the employee was in fact driving to his own residence for the ***purely personal purpose of having lunch***").

Because it is uncontested that Lujan was on his lunch break at the time of the accident, Morgan now contends that there are several exceptions to the going and coming rule; for instance, where: (1) an employee was using the employer's vehicle "in furtherance of the employer's purpose"; (2) the employer "derived a 'benefit' from the employee's use of a company vehicle"; (3) the employee was driving a company vehicle during non-work hours for the employer's "convenience" or "constant benefit" (i.e., being "on-call" at all times); or (4) the employee was on a "special errand" which "incidentally or indirectly" contributed to or benefitted the employer. (Pet. at 3:12-15, 20:10-18, 21:12-23:15.) Morgan further contends that Harvest gained a benefit "by virtue of having Lujan available to pick up and drop off passengers." (*Id.* at 3:5-9.)

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However, Morgan never raised this argument before the District Court. (12P.A. at 1865-1871; 18P.A. at 2786-2799; 24P.A. at 3743-3760.) Thus, Morgan cannot raise this issue for the first time in this Petition. *Emerson v. Eighth Jud. Dist. Ct. ex rel. Cnty. of Clark*, 127 Nev. 672, 680, 263 P.3d 224, 229 (2011). By raising issues here which the District Court never had the opportunity to consider, it is impossible for Morgan to demonstrate that the District Court manifestly abused its discretion in denying the entry of judgment against Harvest. *Walker v. Second Jud. Dist. Ct. ex rel. Cnty. of Washoe*, Nev. Adv. Op. 80, 476 P.3d 1194, 1196-97 (Dec. 10, 2020).

Moreover, Morgan fails to cite to any evidence which proves that Harvest derived any benefit from Lujan's use of the bus during his lunch break. As such, Morgan cannot demonstrate that the evidence at trial supports a judgment against Harvest for vicarious liability.

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IV. CONCLUSION

For the foregoing reasons, Harvest respectfully requests that this Court deny Mr. Morgan's Petition for Writ of Mandamus or Prohibition in its entirety.

DATED this 27th day of January, 2019.

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By: _*/s/ Dennis L. Kennedy*_____
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VERIFICATION

STATE OF NEVADA)

COUNTY OF CLARK)

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

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

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

True and correct copies of the orders and papers served and filed by the parties in the underlying action that may be essential to an understanding of the

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matters set forth in the Answer are contained in the Petitioner's Appendix and the Real Party in Interest's Appendix to this Answer.

EXECUTED on this 27th day of January, 2021.

/s/ Dennis L. Kennedy
DENNIS L. KENNEDY

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NRAP 21(e) CERTIFICATE OF COMPLIANCE

1. I hereby certify that this Answer 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 Answer has been prepared in a proportionally spaced typeface using Microsoft Office 365 in Times New Roman font 14.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 21(d) because it contains 6,982 words.

2. I further certify that I have read this Answer, 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 Answer complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the Answer 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 Answer is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 27th day of January, 2021.

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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 27th day of January, 2021, service of the foregoing **ANSWER TO PETITION FOR EXTRAORDINARY WRIT RELIEF** and **REAL PARTY IN INTEREST'S APPENDIX TO ANSWER TO PETITION FOR EXTRAORDINARY WRIT RELIEF (Volume 1)** 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 E-MAIL

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Respondent

/s/ Angelique Mattox
Employee of BAILEY❖KENNEDY

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ADDENDUM

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2018 WL 6133883
Only the Westlaw citation is currently available.

Court of Appeals of Nevada.

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

No. 74324-COA
|
FILED NOVEMBER 20, 2018

Attorneys and Law Firms

Law Offices of Eric R. Blank

William B. Palmer, II

Howard & Howard Attorneys PLLC

ORDER OF AFFIRMANCE

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

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

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

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

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

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

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

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

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

ORDER the judgment of the district court AFFIRMED.

All Citations

Not Reported in Pac. Rptr., 2018 WL 6133883

End of Document

West's Nevada Revised Statutes Annotated
Nevada Rules of Court
Rules of Practice for the Eighth Judicial District Court
Part II. Civil Practice

EDCR Rule 2.24

Rule 2.24. Rehearing of motions

Effective: January 1, 2020

Currentness

(a) No motions once heard and disposed of may be renewed in the same cause, nor may the same matters therein embraced be reheard, unless by leave of the court granted upon motion therefor, after notice of such motion to the adverse parties.

(b) A party seeking reconsideration of a ruling of the court, other than any order that may be addressed by motion pursuant to NRCP 50(b), 52(b), 59 or 60, must file a motion for such relief within 14 days after service of written notice of the order or judgment unless the time is shortened or enlarged by order. A motion for rehearing or reconsideration must be served, noticed, filed and heard as is any other motion. A motion for reconsideration does not toll the period for filing a notice of appeal from a final order or judgment.

(c) If a motion for rehearing is granted, the court may make a final disposition of the cause without reargument or may reset it for reargument or resubmission or may make such other orders as are deemed appropriate under the circumstances of the particular case.

Credits

Amended eff. Jan. 1, 2020.

Eighth Judicial District Court Rule 2.24, NV ST 8 DIST CT Rule 2.24
Current with amendments received through November 15, 2020.

End of Document

United States Code Annotated
Federal Rules of Civil Procedure for the United States District Courts (Refs & Annos)
Title VI. Trials

Federal 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 must direct the jury to further consider its answers and verdict, or must order a new trial.

CREDIT(S)

(Amended January 21, 1963, effective July 1, 1963; March 2, 1987, effective August 1, 1987; April 30, 2007, effective December 1, 2007.)

ADVISORY COMMITTEE NOTES

1937 Adoption

The Federal courts are not bound to follow state statutes authorizing or requiring the court to ask a jury to find a special verdict or to answer interrogatories. *Victor American Fuel Co. v. Peccarich,* 209 Fed. 568 (C.C.A.8th,

1913), cert. den. 232 U.S. 727, 34 S.Ct. 603, 58 L.Ed. 817 (1914); *Spokane and I.E.R. Co. v. Campbell,* 217 Fed. 518 (C.C.A.9th, 1914), affd. 241 U.S. 497, 36 S.Ct. 683, 60 L.Ed. 1125 (1916); Simkins, *Federal Practice* (1934) § 186. The power of a territory to adopt by statute the practice under Subdivision (b) has been sustained. *Walker v. New Mexico and Southern Pacific R.R.,* 165 U.S. 593, 17 S.Ct. 421, 41 L.Ed. 837 (1897); *Southwestern Brewery and Ice Co. v. Schmidt,* 226 U.S. 162, 33 S.Ct. 68, 57 L.Ed. 170 (1912).

Compare Wis.Stat. (1935) §§ 270.27, 270.28 and 270.30; Green, *A New Development in Jury Trial* (1927), 13 A.B.A.J. 715; *Morgan, A Brief History of Special Verdicts and Special Interrogatories,* 1923, 32 Yale L.J. 575.

The provisions of U.S.C., Title 28, [former] § 400(3) (now §§ 2201, 2202) (Declaratory judgments authorized; procedure) permitting the submission of issues of fact to a jury are covered by this rule.

1963 Amendment

This amendment conforms to the amendment of Rule 58. See the Advisory Committee's Note to Rule 58, as amended.

1987 Amendment

The amendments are technical. No substantive change is intended.

2007 Amendment

The language of Rule 49 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Notes of Decisions (647)

Fed. Rules Civ. Proc. Rule 49, 28 U.S.C.A., FRCP Rule 49
Including Amendments Received Through 1-1-21

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 12A

Rule 12A. Remand After an Indicative Ruling by the District Court on a Motion for Relief that is Barred by a Pending Appeal

Effective: January 1, 2019

Currentness

(a) Notice to the Appellate Court. If a timely motion is made in the district court for relief that it lacks authority to grant because of an appeal that has been docketed and is pending, the movant must promptly notify the clerk of the Supreme Court if the district court states either that it would grant the motion or that the motion raises a substantial issue.

(b) Remand After an Indicative Ruling. If the district court states that it would grant the motion or that the motion raises a substantial issue, the Supreme Court or the Court of Appeals may remand for further proceedings but the appellate court retains jurisdiction unless it expressly dismisses the appeal. If the appellate court remands but retains jurisdiction, the parties must promptly notify the clerk of the Supreme Court when the district court has decided the motion on remand.

Credits

Adopted effective March 1, 2019.

Editors' Notes

ADVISORY COMMITTEE NOTES

2019 Adoption

This new rule is modeled on FRAP 12.1 and works in conjunction with new NRCP 62.1. Like its federal counterpart. Rule 12A does not attempt to define the circumstances in which a pending appeal limits or defeats the district court's authority to act. See FRAP 12.1 advisory committee's note (2009 amendment). Rather, these rules provide the procedure to follow when a party seeks relief in the district court from an order or judgment

that the district court has lost jurisdiction over due to a pending appeal, consistent with Huneycutt v. Huneycutt, 94 Nev. 79, 575 P.2d 585 (1978), and its progeny.

Rules App. Proc., Rule 12A, NV ST RAP Rule 12A
Current with amendments received through November 15, 2020.

End of Document

West's Nevada Revised Statutes Annotated
Nevada Rules of Court
Rules of Appellate Procedure (Refs & Annos)
III. Extraordinary Writs

Nevada Rules of Appellate Procedure, Rule 21

Rule 21. Writs of Mandamus and Prohibition and Other Extraordinary Writs

Effective: June 7, 2020

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; Length; 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. A petition shall not exceed 15 pages unless it contains no more than 7,000 words (or 650 lines of text in a monospaced typeface) or the court grants leave to file a longer petition. Unless the court directs otherwise, the same page and type-volume limits apply to any answer, reply, or amicus brief allowed by the court. A motion to exceed the page or type-volume limit in this rule must comply with Rule 32(a)(7)(D).

(e) Certificate of Compliance. A petition filed under this Rule and any answer, reply, or amicus brief allowed by the court must include a certificate of compliance that comports with NRAP 32(a)(9).

(f) Disclosure Statement. A petition and any answer thereto shall be accompanied by the disclosure statement required by NRAP 26.1.

(g) 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; June 7, 2020.

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 November 15, 2020.

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

Effective: January 1, 2019

Currentness

(a) When a Deposition May Be Taken.

(1) *Without Leave.* A party may, by oral questions, depose any person, including a party, without leave of court except as provided in Rule 30(a)(2). The deponent's attendance may be compelled by subpoena under Rule 45.

(2) *With Leave.* A party must obtain leave of court, and the court must grant leave to the extent consistent with Rule 26(b)(1) and (2):

(A) if the parties have not stipulated to the deposition and:

(i) the deposition would result in more than 10 depositions being taken under this rule or Rule 31 by the plaintiffs, or by the defendants, or by the third-party defendants, not counting any deposition that is solely a custodian-of-records deposition;

(ii) the deponent has already been deposed in the case; or

(iii) the party seeks to take the deposition before the time specified in Rule 26(a), unless the party certifies in the notice, with supporting facts, that the deponent is expected to leave Nevada and be unavailable for examination in the state after that time; or

(B) if the deponent is confined in prison.

(b) Notice of the Deposition; Other Formal Requirements.

(1) *Notice in General.* A party who wants to depose a person by oral questions must give not less than 14 days' written notice to every other party. The notice must state the time and place of the deposition and, if known, the deponent's name and address. If the name is unknown, the notice must provide a general description sufficient to identify the person or the particular class or group to which the person belongs.

(2) *Producing Documents.* If a subpoena duces tecum is to be served on the deponent, the materials designated for production, as set out in the subpoena, must be listed in the notice or in an attachment. The notice to a party deponent may be accompanied by a request under Rule 34 to produce documents and tangible things at the deposition.

(3) *Method of Recording.*

(A) Method Stated in the Notice. The party who notices the deposition must state in the notice the method for recording the testimony. Unless the court orders otherwise, testimony may be recorded by audio, audiovisual, or stenographic means. The noticing party bears the recording costs. Any party may arrange to transcribe a deposition.

(B) Additional Method. With prior notice to the deponent and other parties, any party may designate another method for recording the testimony in addition to that specified in the original notice. That party bears the expense of the additional record or transcript unless the court orders otherwise.

(4) *By Remote Means.* The parties may stipulate--or the court may on motion order--that a deposition be taken by telephone or other remote means. For the purpose of this rule and Rules 28(a), 37(a)(2), and 37(b), the deposition takes place where the deponent answers the questions.

(5) *Officer's Duties.*

(A) Before the Deposition. Unless the parties stipulate otherwise, a deposition must be conducted before an officer appointed or designated under Rule 28. The officer must begin the deposition with an on-the-record statement that includes:

(i) the officer's name and business address;

(ii) the date, time, and place of the deposition;

(iii) the deponent's name;

(iv) the officer's administration of the oath or affirmation to the deponent; and

(v) the identity of all persons present.

(B) Conducting the Deposition; Avoiding Distortion. If the deposition is recorded nonstenographically, the officer must repeat the items in Rule 30(b)(5)(A)(i)-(iii) at the beginning of each unit of the recording medium. The deponent's and attorneys' appearance or demeanor must not be distorted through recording techniques.

(C) After the Deposition. At the end of a deposition, the officer must state on the record that the deposition is complete and must set out any stipulations made by the attorneys about custody of the transcript or recording and of the exhibits, or about any other pertinent matters.

(6) *Notice or Subpoena Directed to an Organization.* In its notice or subpoena, a party may name as the deponent a public or private corporation, a partnership, an association, a governmental agency, or other entity and must describe with reasonable particularity the matters for examination. The named organization must then designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf; and it may set out the matters on which each person designated will testify. A subpoena must advise a nonparty organization of its duty to make this designation. The persons designated must testify about information known or reasonably available to the organization. Rule 30(b)(6) does not preclude a deposition by any other procedure allowed by these rules.

(c) Examination and Cross-Examination; Record of the Examination; Objections; Written Questions.

(1) *Examination and Cross-Examination.* The examination and cross-examination of a deponent proceed as they

would at trial under Nevada law of evidence, except NRS 47.040-47.080 and NRS 50.155. After putting the deponent under oath or affirmation, the officer must record the testimony by the method designated under Rule 30(b)(3)(A). The testimony must be recorded by the officer personally or by a person acting in the presence and under the direction of the officer.

(2) *Objections.* An objection at the time of the examination--whether to evidence, to a party's conduct, to the officer's qualifications, to the manner of taking the deposition, or to any other aspect of the deposition--must be noted on the record, but the examination still proceeds; the testimony is taken subject to any objection. An objection must be stated concisely in a nonargumentative and nonsuggestive manner. A person may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation ordered by the court, or to present a motion under Rule 30(d)(3).

(3) *Participating Through Written Questions.* Instead of participating in the oral examination, a party may serve written questions in a sealed envelope on the party noticing the deposition, who must deliver them to the officer. The officer must ask the deponent those questions and record the answers verbatim.

(d) Duration; Sanction; Motion to Terminate or Limit.

(1) *Duration.* Unless otherwise stipulated or ordered by the court, a deposition is limited to 1 day of 7 hours of testimony. The court must allow additional time consistent with Rule 26(b)(1) and (2) if needed to fairly examine the deponent or if the deponent, another person, or any other circumstance impedes or delays the examination.

(2) *Sanction.* The court may impose an appropriate sanction--including the reasonable expenses and attorney fees incurred by any party--on a person who impedes, delays, or frustrates the fair examination of the deponent.

(3) *Motion to Terminate or Limit.*

(A) Grounds. At any time during a deposition, the deponent or a party may move to terminate or limit it on the ground that it is being conducted in bad faith or in a manner that unreasonably annoys, embarrasses, or oppresses the deponent or party. The motion may be filed in the court where the action is pending or, if the deposition is being conducted under an out-of-state subpoena, where the deposition is being taken. If the objecting deponent or party so demands, the deposition must be suspended for the time necessary to obtain an order.

(B) Order. The court may order that the deposition be terminated or may limit its scope and manner as

provided in Rule 26(c). If terminated, the deposition may be resumed only by order of the court where the action is pending.

(C) Award of Expenses. Rule 37(a)(5) applies to the award of expenses.

(e) Review by the Witness; Changes.

(1) *Review; Statement of Changes.* On request by the deponent or a party before the deposition is completed, the deponent must be allowed 30 days after being notified by the officer that the transcript or recording is available in which:

(A) to review the transcript or recording; and

(B) if there are changes in form or substance, to sign a statement listing the changes and the reasons for making them.

(2) *Changes Indicated in the Officer's Certificate.* The officer must note in the certificate prescribed by Rule 30(f)(1) whether a review was requested and, if so, must attach any changes the deponent makes during the 30-day period.

(f) Certification and Delivery; Exhibits; Copies of the Transcript or Recording; Filing.

(1) *Certification and Delivery.* The officer must certify in writing that the witness was duly sworn and that the deposition accurately records the witness's testimony. The certificate must accompany the record of the deposition. Unless the court orders otherwise, the officer must seal the deposition in an envelope or package bearing the title of the action and marked "Deposition of [witness's name]" and must promptly send it to the attorney who arranged for the transcript or recording. The attorney must store it under conditions that will protect it against loss, destruction, tampering, or deterioration.

(2) *Documents and Tangible Things.*

(A) Originals and Copies. Documents and tangible things produced for inspection during a deposition must,

on a party's request, be marked for identification and attached to the deposition. Any party may inspect and copy them. But if the person who produced them wants to keep the originals, the person may:

(i) offer copies to be marked, attached to the deposition, and then used as originals--after giving all parties a fair opportunity to verify the copies by comparing them with the originals; or

(ii) give all parties a fair opportunity to inspect and copy the originals after they are marked--in which event the originals may be used as if attached to the deposition.

(B) Order Regarding the Originals. Any party may move for an order that the originals be attached to the deposition pending final disposition of the case.

(3) *Copies of the Transcript or Recording.* Unless otherwise stipulated or ordered by the court, the officer must retain the stenographic notes of a deposition taken stenographically or a copy of the recording of a deposition taken by another method. When paid reasonable charges, the officer must furnish a copy of the transcript or recording to any party or the deponent.

(4) *Notice of Filing.* A party who files the deposition must promptly notify all other parties of the filing.

(g) Failure to Attend a Deposition or Serve a Subpoena; Expenses. A party who, expecting a deposition to be taken, attends in person or by an attorney may recover reasonable expenses for attending, including attorney fees, if the noticing party failed to:

(1) attend and proceed with the deposition; or

(2) serve a subpoena on a nonparty deponent, who consequently did not attend.

(h) Expert Witness Fees.

(1) *In General.*

(A) A party desiring to depose any expert who is to be asked to express an opinion must pay the reasonable and customary hourly or daily fee for the actual time consumed in the examination of that expert by the party noticing the deposition.

(B) If any other attending party desires to question the witness, that party is responsible for the expert's fee for the actual time consumed in that party's examination.

(2) *Advance Request; Balance Due.*

(A) If requested by the expert before the date of the deposition, the party taking the deposition of an expert must tender the expert's fee based on the anticipated length of that party's examination of the witness.

(B) If the deposition of the expert takes longer than anticipated, any party responsible for any additional fee must pay the balance of that expert's fee within 30 days of receipt of an invoice from the expert.

(3) *Preparation; Review of Transcript.* Any party identifying an expert whom the party expects to call at trial is responsible for any fee charged by the expert for preparing for the deposition and reviewing the deposition transcript.

(4) *Objections.*

(A) Motion; Contents; Notice. If a party deems that an expert's hourly or daily fee for providing deposition testimony is unreasonable, that party may move for an order setting the compensation of that expert. This motion must be accompanied by an affidavit stating facts showing a reasonable and good faith attempt at an informal resolution of any issue presented by the motion. Notice of this motion must be given to the expert.

(B) Court Determination of Expert Fee. If the court determines that the fee demanded by the expert is unreasonable, the court must set the fee of the expert for providing deposition testimony.

(C) Sanctions. The court may impose a sanction under Rule 37 against any party who does not prevail, and in favor of any party who does prevail, on a motion to set expert witness fee, provided the prevailing party has engaged in a reasonable and good faith attempt at an informal resolution of any issues presented by the motion.

Credits

Amended effective January 1, 2005; March 1, 2014; May 1, 2014; March 1, 2019.

Editors' Notes

ADVISORY COMMITTEE NOTES

2019 Amendment

The amendments generally conform Rule 30 to FRCP 30, but retain NRCP 30(h), which governs fees associated with expert depositions. Consistent with the federal rule, Rule 30(a)(2)(A)(i) now limits the parties to 10 depositions per side absent stipulation or court order. The Nevada rule, however, does not count depositions of custodians of records toward the 10-deposition limit per side.

The "7 hours of testimony" specified in Rule 30(d)(1) means 7 hours on the record. The time taken for convenience breaks, recess for a meal, or an adjournment under Rule 30(d)(3) does not count as deposition time.

Discussion between the deponent and counsel during a convenience break is not privileged unless counsel called the break to preserve a privilege, to enforce a limitation ordered by the court, or to present a motion under Rule 30(d)(3). After a privilege-assessment break, counsel for the deponent must place on the record: (1) that a conference took place; (2) the subject of the conference; and (3) the result of the conference, i.e., whether to assert privilege or not. *Coyote Springs Inv., LLC v. Eighth Judicial Dist. Court*, 131 Nev. 140, 149, 347 P.3d 267, 273 (2015).

If a deposition is recorded by audio or audiovisual means and is later transcribed, any dispute regarding the accuracy of the transcription or of multiple competing transcriptions should be resolved by the court or discovery commissioner.

Notes of Decisions (21)

Civ. Proc. Rules, Rule 30, NV ST RCP Rule 30
Current with amendments received through November 15, 2020.

West's Nevada Revised Statutes Annotated
Nevada Rules of Court
Rules of Civil Procedure (Refs & Annos)
VI. Trials

Rules of Civil Procedure, Rule 42

Rule 42. Consolidation; Separate Trials

Effective: January 1, 2019

Currentness

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

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

(2) consolidate the actions; or

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

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

Credits

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

Notes of Decisions (21)

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

West's Nevada Revised Statutes Annotated
Nevada Rules of Court
Rules of Civil Procedure (Refs & Annos)
VI. Trials

Rules of Civil Procedure, Rule 49

Rule 49. Special Verdict; General Verdict and Questions

Effective: January 1, 2019

Currentness

(a) Special Verdict.

(1) *In General.* The court may require a jury to return only a special verdict in the form of a special written finding on each issue of fact. The court may do so by:

(A) submitting written questions susceptible of a categorical or other brief answer;

(B) submitting written forms of the special findings that might properly be made under the pleadings and evidence; or

(C) using any other method that the court considers appropriate.

(2) *Instructions.* The court must give the instructions and explanations necessary to enable the jury to make its findings on each submitted issue.

(3) *Issues Not Submitted.* A party waives the right to a jury trial on any issue of fact raised by the pleadings or evidence but not submitted to the jury unless, before the jury retires, the party demands its submission to the jury. If the party does not demand submission, the court may make a finding on the issue. If the court makes no finding, it is considered to have made a finding consistent with its judgment on the special verdict.

(b) General Verdict With Answers to Written Questions.

(1) *In General.* The court may submit to the jury forms for a general verdict, together with written questions on one or more issues of fact that the jury must decide. The court must give the instructions and explanations necessary to enable the jury to render a general verdict and answer the questions in writing, and must direct the jury to do both.

(2) *Verdict and Answers Consistent.* When the general verdict and the answers are consistent, the court must approve, for entry under Rule 58, an appropriate judgment on the verdict and answers.

(3) *Answers Inconsistent With the Verdict.* When the answers are consistent with each other but one or more is inconsistent with the general verdict, the court may:

(A) approve, for entry under Rule 58, an appropriate judgment according to the answers, notwithstanding the general verdict;

(B) direct the jury to further consider its answers and verdict; or

(C) order a new trial.

(4) *Answers Inconsistent With Each Other and the Verdict.* When the answers are inconsistent with each other and one or more is also inconsistent with the general verdict, judgment must not be entered; instead, the court may:

(A) direct the jury to further consider its answers and verdict; or

(B) order a new trial.

Credits

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

