

IN THE SUPREME COURT OF THE STATE OF NEVADA

INDICATE FULL CAPTION:

HARVEST MANAGEMENT SUB LLC, a foreign limited liability company,

Appellant

vs.

AARON M. MORGAN, individually

No. 85834

Electronically Filed

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DOCKETING STATEMENT

CIVIL APPEALS

Elizabeth A. Brown
Clerk of Supreme Court

GENERAL INFORMATION

Appellants must complete this docketing statement in compliance with NRAP 14(a). The purpose of the docketing statement is to assist the Supreme Court in screening jurisdiction, identifying issues on appeal, assessing presumptive assignment to the Court of Appeals under NRAP 17, scheduling cases for oral argument and settlement conferences, classifying cases for expedited treatment and assignment to the Court of Appeals, and compiling statistical information.

WARNING

This statement must be completed fully, accurately and on time. NRAP 14(c). The Supreme Court may impose sanctions on counsel or appellant if it appears that the information provided is incomplete or inaccurate. *Id.* Failure to fill out the statement completely or to file it in a timely manner constitutes grounds for the imposition of sanctions, including a fine and/or dismissal of the appeal.

A complete list of the documents that must be attached appears as Question 27 on this docketing statement. Failure to attach all required documents will result in the delay of your appeal and may result in the imposition of sanctions.

This court has noted that when attorneys do not take seriously their obligations under NRAP 14 to complete the docketing statement properly and conscientiously, they waste the valuable judicial resources of this court, making the imposition of sanctions appropriate. See KDI Sylvan Pools v. Workman, 107 Nev. 340, 344, 810 P.2d 1217, 1220 (1991). Please use tab dividers to separate any attached documents.

1. Judicial District Eighth Judicial District Court Department 7
County Clark County Judge Linda Bell
District Ct. Case No. A-15-718679-C

2. Attorney filing this docketing statement:

Attorney Dennis L. Kennedy; Sarah E. Harmon; Tayler D. Bingham Telephone 702-562-8820
Firm Bailey Kennedy
Address 8984 Spanish Ridge Avenue
Las Vegas, Nevada 89148-1302

Client(s) Harvest Management Sub LLC

If this is a joint statement by multiple appellants, add the names and addresses of other counsel and the names of their clients on an additional sheet accompanied by a certification that they concur in the filing of this statement.

3. Attorney(s) representing respondents(s):

Attorney Micah S. Echols Telephone 702-655-2346
Firm Claggett & Sykes Law Firm
Address 4101 Meadows Lane, Ste. 100
Las Vegas, Nevada 89107

Client(s) Aaron M. Morgan

Attorney Benjamin P. Cloward; Bryan A. Boyack Telephone 702-444-4444
Firm Richard Harris Law Firm
Address 801 South Fourth Street
Las Vegas, Nevada 89101

Client(s) Aaron M. Morgan

(List additional counsel on separate sheet if necessary)

4. Nature of disposition below (check all that apply):

- | | |
|---|---|
| <input type="checkbox"/> Judgment after bench trial | <input type="checkbox"/> Dismissal: |
| <input checked="" type="checkbox"/> Judgment after jury verdict | <input type="checkbox"/> Lack of jurisdiction |
| <input checked="" type="checkbox"/> Summary judgment | <input type="checkbox"/> Failure to state a claim |
| <input type="checkbox"/> Default judgment | <input checked="" type="checkbox"/> Failure to prosecute |
| <input type="checkbox"/> Grant/Denial of NRCP 60(b) relief | <input type="checkbox"/> Other (specify): _____ |
| <input type="checkbox"/> Grant/Denial of injunction | <input type="checkbox"/> Divorce Decree: |
| <input type="checkbox"/> Grant/Denial of declaratory relief | <input type="checkbox"/> Original <input type="checkbox"/> Modification |
| <input type="checkbox"/> Review of agency determination | <input type="checkbox"/> Other disposition (specify): _____ |

5. Does this appeal raise issues concerning any of the following?

- ☐ Child Custody
- ☐ Venue
- ☐ Termination of parental rights

6. Pending and prior proceedings in this court. List the case name and docket number of all appeals or original proceedings presently or previously pending before this court which are related to this appeal:

Harvest Management Sub LLC v. Eighth Judicial District Court, No. 78596 (May 15, 2019)
Morgan v. Lujan, No. 77753, (Sept. 17, 2019)
Harvest Management v. Eighth Judicial District Court, Nos. 81975, 80837 (Sept. 14, 2021)

7. Pending and prior proceedings in other courts. List the case name, number and court of all pending and prior proceedings in other courts which are related to this appeal (e.g., bankruptcy, consolidated or bifurcated proceedings) and their dates of disposition:

8. Nature of the action. Briefly describe the nature of the action and the result below:

See Exhibit 1 for a full description of the nature of the action and the result below.

9. Issues on appeal. State concisely the principal issue(s) in this appeal (attach separate sheets as necessary):

1. Whether the District Court erred in finding that Plaintiff had pleaded a claim for vicarious liability rather than for negligent entrustment against Harvest;
2. Whether the District Court erred in finding that Plaintiff had not voluntarily abandoned any claim for vicarious liability or negligent entrustment at trial;
3. Whether the District Court erred when it shifted the burden of proof onto Harvest to demonstrate that Mr. Lujan was not acting within the course and scope of his employment when the accident occurred;
4. Whether the District Court erred when it denied Harvest's Motion for Entry of Judgment even though it found that Mr. Morgan had presented insufficient evidence to determine whether Mr. Lujan was acting within the course and scope of his employment;
5. Whether the District Court erred in applying Nevada's "going and coming" rule;
6. Whether the District Court erred when it ordered a separate trial on vicarious liability under NRCP 42 after trial had already taken place and after the jury entered a verdict which did not find Harvest liable;
7. Whether the District Court erred when it denied Harvest's Motion to Dismiss under NRCP 41 for Mr. Morgan's failure to bring an action against Harvest to trial within five years of the commencement of the action;
8. Whether substantial evidence supported the District Court's factual determination that Mr. Lujan was "on the clock for his job as a shuttle bus driver for Harvest . . . at the time of the crash;" and
9. Whether the District Court erred when it entered summary judgment in Mr. Morgan's favor based upon its own determination that Mr. Lujan's affidavit--which was acquired after discovery had concluded and after judgment had been rendered against Mr. Lujan--which stated that he was not on a lunch break when the accident occurred was more credible than Mr. Lujan's trial testimony that he was on a lunch break when the accident occurred.

10. Pending proceedings in this court raising the same or similar issues. If you are aware of any proceedings presently pending before this court which raises the same or similar issues raised in this appeal, list the case name and docket numbers and identify the same or similar issue raised:

11. Constitutional issues. If this appeal challenges the constitutionality of a statute, and the state, any state agency, or any officer or employee thereof is not a party to this appeal, have you notified the clerk of this court and the attorney general in accordance with NRAP 44 and NRS 30.130?

☒ N/A

☐ Yes

☐ No

If not, explain:

12. Other issues. Does this appeal involve any of the following issues?

☐ Reversal of well-settled Nevada precedent (identify the case(s))

☐ An issue arising under the United States and/or Nevada Constitutions

☒ A substantial issue of first impression

☒ An issue of public policy

☐ An issue where en banc consideration is necessary to maintain uniformity of this court's decisions

☐ A ballot question

If so, explain: This appeal may require this Court to determine whether Nevada is going to adopt the "lunch break" rule under Nevada's "coming and going" rule as California courts have done.

13. Assignment to the Court of Appeals or retention in the Supreme Court. Briefly set forth whether the matter is presumptively retained by the Supreme Court or assigned to the Court of Appeals under NRAP 17, and cite the subparagraph(s) of the Rule under which the matter falls. If appellant believes that the Supreme Court should retain the case despite its presumptive assignment to the Court of Appeals, identify the specific issue(s) or circumstance(s) that warrant retaining the case, and include an explanation of their importance or significance:

This matter is not presumptively assigned to the Court of Appeals, nor is this matter presumptively retained by the Supreme Court. However, the Supreme Court should retain this case because of the potentially significant determinations it could make under NRCP 42 and NRCP 42, the high dollar amount in this matter (over \$3 million), and the Supreme Court's familiarity with this case already based upon the multiple writ petitions that have been filed with it on these issues.

14. Trial. If this action proceeded to trial, how many days did the trial last? 6

Was it a bench or jury trial? This case went through a jury trial but Harvest Management's liability was decided by summary judgment after the Second Jury Trial and before a Third Jury Trial.

15. Judicial Disqualification. Do you intend to file a motion to disqualify or have a justice recuse him/herself from participation in this appeal? If so, which Justice?

Justice Bell must recuse herself from this matter because she was the district court judge presiding over this matter and with whose decisions Harvest Management respectfully submits were incorrect.

TIMELINESS OF NOTICE OF APPEAL

16. Date of entry of written judgment or order appealed from November 16, 2022

If no written judgment or order was filed in the district court, explain the basis for seeking appellate review:

17. Date written notice of entry of judgment or order was served November 16, 2022

Was service by:

☐ Delivery

☒ Mail/electronic/fax

18. If the time for filing the notice of appeal was tolled by a post-judgment motion (NRCP 50(b), 52(b), or 59)

(a) Specify the type of motion, the date and method of service of the motion, and the date of filing.

☐ NRCP 50(b) Date of filing _____

☐ NRCP 52(b) Date of filing _____

☐ NRCP 59 Date of filing _____

NOTE: Motions made pursuant to NRCP 60 or motions for rehearing or reconsideration may toll the time for filing a notice of appeal. See AA Primo Builders v. Washington, 126 Nev. ____, 245 P.3d 1190 (2010).

(b) Date of entry of written order resolving tolling motion _____

(c) Date written notice of entry of order resolving tolling motion was served _____

Was service by:

☐ Delivery

☐ Mail

19. Date notice of appeal filed December 13, 2022

If more than one party has appealed from the judgment or order, list the date each notice of appeal was filed and identify by name the party filing the notice of appeal:

20. Specify statute or rule governing the time limit for filing the notice of appeal, e.g., NRAP 4(a) or other

NRAP 4(a)

SUBSTANTIVE APPEALABILITY

21. Specify the statute or other authority granting this court jurisdiction to review the judgment or order appealed from:

(a)

☒ NRAP 3A(b)(1)

☐ NRS 38.205

☐ NRAP 3A(b)(2)

☐ NRS 233B.150

☐ NRAP 3A(b)(3)

☐ NRS 703.376

☐ Other (specify) _____

(b) Explain how each authority provides a basis for appeal from the judgment or order:

In this case, there are two defendants: Mr. Lujan and Harvest Management. A final judgment was entered against Mr. Lujan previously. The order granting summary judgment against Harvest Management for vicarious liability is a final judgment under NRAP 3A(b)(1) because the rights and liabilities of all parties has now been decided.

22. List all parties involved in the action or consolidated actions in the district court:

(a) Parties:

David E. Lujan;
Aaron M. Morgan;
Harvest Management Sub LLC

(b) If all parties in the district court are not parties to this appeal, explain in detail why those parties are not involved in this appeal, *e.g.*, formally dismissed, not served, or other:

Mr. Lujan is not involved in this appeal. He has a judgment entered against him in this case. He has not chosen to file appeal.

23. Give a brief description (3 to 5 words) of each party's separate claims, counterclaims, cross-claims, or third-party claims and the date of formal disposition of each claim.

Harvest:

Motion for Entry of Judgment (denied January 3, 2020)
Separate Trial on Vicarious Liability (granted January 3, 2020)
Motion to Dismiss under NRCP 41(e) (denied August 11, 2022)
Motion for Summary Judgment (granted November 16, 2022)

Mr. Lujan: Negligence--Special Verdict (granted April 9, 2018)

24. Did the judgment or order appealed from adjudicate ALL the claims alleged below and the rights and liabilities of ALL the parties to the action or consolidated actions below?

☒ Yes

☐ No

25. If you answered "No" to question 24, complete the following:

(a) Specify the claims remaining pending below:

(b) Specify the parties remaining below:

(c) Did the district court certify the judgment or order appealed from as a final judgment pursuant to NRCP 54(b)?

☐ Yes

☐ No

(d) Did the district court make an express determination, pursuant to NRCP 54(b), that there is no just reason for delay and an express direction for the entry of judgment?

☐ Yes

☐ No

26. If you answered "No" to any part of question 25, explain the basis for seeking appellate review (*e.g.*, order is independently appealable under NRAP 3A(b)):

27. Attach file-stamped copies of the following documents:

- The latest-filed complaint, counterclaims, cross-claims, and third-party claims
- Any tolling motion(s) and order(s) resolving tolling motion(s)
- Orders of NRCP 41(a) dismissals formally resolving each claim, counterclaims, cross-claims and/or third-party claims asserted in the action or consolidated action below, even if not at issue on appeal
- Any other order challenged on appeal
- Notices of entry for each attached order

VERIFICATION

I declare under penalty of perjury that I have read this docketing statement, that the information provided in this docketing statement is true and complete to the best of my knowledge, information and belief, and that I have attached all required documents to this docketing statement.

Harvest Management Sub LLC
Name of appellant

Dennis L. Kennedy
Name of counsel of record

January 9, 2023
Date

/s/ Dennis L. Kennedy
Signature of counsel of record

Nevada, Clark County
State and county where signed

CERTIFICATE OF SERVICE

I certify that on the 9th day of January, 2023, I served a copy of this completed docketing statement upon all counsel of record:

☐ By personally serving it upon him/her; or

☒ By mailing it by first class mail with sufficient postage prepaid to the following address(es): (NOTE: If all names and addresses cannot fit below, please list names below and attach a separate sheet with the addresses.)

See Ex. 2 for full certificate of service.

Dated this 9th day of January, 2023

/s/ Karen Rodman, an Employee of Bailey Kennedy
Signature

EXHIBIT 1

EXHIBIT 1

8. Nature of the action. Briefly describe the nature of the action and the result below:

In 2014, Mr. Lujan, a shuttlebus driver for the Montara Meadows retirement facility, exited Paradise Park and crashed into Mr. Morgan. Mr. Morgan sued Mr. Lujan for the resulting injuries. He also sued Harvest, *labelling* his claim against Harvest as one for vicarious liability, but *substantively pleading* a claim for negligent entrustment. Leading up to trial, Mr. Morgan had not pleaded vicarious liability, did not propound discovery regarding it, and did not mention vicarious liability in the pretrial memorandum.

In 2017, the Parties tried this case before a jury (the “First Trial”). During the First Trial, Mr. Lujan testified that he crashed into Mr. Morgan while *returning from his lunch break*. However, before the case could be determined on its merits, the district court declared a mistrial. Thus, by the end of the First Trial, Mr. Morgan had only presented evidence that *repudiated* any claim for vicarious liability against Harvest.

The Parties then tried this case again in 2018 (the “Second Trial”). At the Second Trial, the district court did not recognize Harvest as a party, and Mr. Morgan never mentioned Harvest—or vicarious liability—in his Voir Dire, Opening Statement, or Closing Statement. Mr. Morgan only presented two pieces of evidence concerning Harvest: (1) Mr. Lujan’s First Trial testimony (which never mentioned Harvest); and (2) Harvest’s 30(b)(6)’s testimony that confirmed Mr. Lujan’s First Trial testimony. Mr. Morgan did not even ask if Harvest *employed* Mr. Lujan.

Critically, *there were no jury instructions on vicarious liability, no jury instructions regarding the course and scope of employment, nor even jury instructions on negligent entrustment*. Mr. Morgan did not even propose any such instructions. Moreover, the special verdict form, which Mr. Morgan had the

opportunity to edit and which Mr. Morgan approved, *did not include Harvest at all*. Even worse, Mr. Morgan, in his closing statement, explained to the jury how to fill out the special verdict form; that instruction specifically instructed that 100% fault could be assigned to the singular defendant: Mr. Lujan. Ultimately, the jury rendered a verdict *solely against Mr. Lujan*.

Months later, Mr. Morgan raised, for the first time, an alleged vicarious liability claim against Harvest in a Motion for Entry of Judgment (the “Morgan MEJ”) in which he sought to apply the verdict against Harvest because the verdict form lacked any apportionment of fault against Harvest. Mr. Morgan claimed that vicarious liability had been tried by consent. After significant motion practice, Judge Gonzalez denied the motion.

In December 2018, Mr. Morgan appealed from the Morgan MEJ, which this Court dismissed. While the appeal was pending before the Nevada Supreme Court, Harvest filed a Motion for Entry of Judgment (the “Harvest MEJ”), alleging Mr. Morgan had voluntarily abandoned his negligent entrustment claim and, regardless, failed to prove either that claim or the vicarious liability claim at trial. After motion practice, Judge Gonzalez transferred the Harvest MEJ back to Chief Judge Linda Bell but retained jurisdiction over the case. Post-transfer, Chief Judge Bell entered a Decision and Order (the “April 2019 Order”) in which she *agreed that the flawed verdict form used at trial did not support a verdict against Harvest*, stated an intent to reconvene the long-since-discharged jury to fix the verdict form, and contradictorily stated that Harvest failed to contest vicarious liability.

In April 2019, Harvest filed a writ petition before this Court to direct Chief Judge Bell to vacate the April 2019 Order and grant the Harvest MEJ. This Court denied the writ without prejudice but indicated that reconvening a jury would be improper. The district court heard oral argument on the Harvest MEJ. Months later, Chief Judge Bell denied the Harvest MEJ and ordered a separate trial under

NRCP 42(b) on the issues of Harvest's vicarious liability (the "January 2020 Order"). In that January 2020 Order, Chief Judge Bell stated that she could not enter judgment in Harvest's favor on vicarious liability *because the issue had never been addressed at trial*. Specifically, she stated that Mr. Morgan never presented *any* evidence on the issue of vicarious liability. In March 2020, Harvest filed a writ petition regarding the January 2020 Order. Ultimately, this Court denied that writ in September 2021, solely on the grounds that this instant appeal would be an adequate remedy.

Following that denial, Harvest filed a Motion to Dismiss under Rule 41(e), arguing that Mr. Morgan failed to bring the unpled vicarious liability claim to trial within five years (the "41(e) MTD"). After much motion practice, the district court denied this motion because vicarious liability had allegedly been brought to trial twice—despite the district court's earlier finding that it had not.

Shortly thereafter, Mr. Morgan filed a Motion for Summary Judgment Regarding Vicarious Liability (the "MSJ"). In the MSJ, Mr. Morgan provided an affidavit from Mr. Lujan that substantially contradicted the sworn testimony he gave in the First Trial and which had been presented in the Second Trial. In short, following a substantial jury verdict against him individually, Mr. Lujan contradicted his prior sworn testimony and claimed that he was *not* returning from a lunch break when he crashed into Mr. Morgan. Based upon this contradictory affidavit, the district court granted the MSJ, holding Harvest vicariously liable for Mr. Lujan's negligence.

This appeal now follows.

EXHIBIT 2

EXHIBIT 2

CERTIFICATE OF SERVICE

I certify that I am an employee of BAILEY ❖ KENNEDY and that on the 9th day of January, 2023, service of the foregoing **DOCKETING STATEMENT CIVIL APPEALS** 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
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/s/ Karen Rodman
Employee of BAILEY ❖ KENNEDY