IN THE SUPREME COURT
OF THE STATE OF NEVADA

No. 80448

JEFF MYERS, Individually and on behalf of others similarly situated,

District Court # CV15-01359

Appellant,

vs.

RENO CAB COMPANY, INC.,

Respondent.

No. 80449

ARTHUR SHATZ and RICHARD FRATIS, Individually and on behalf of others similarly situated,

District Court #CV15-01385

Appellants,

vs.

ROY L. STREET, Individually and d/b/a CAPITAL CAB,

Respondent.

APPELLANTS' REPLY BRIEF

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IN REPLY TO RESPONDENTS' STATEMENT OF THE CASE

Respondents err when they state: "....the Appellants argue that there is only a single test to be employed in Nevada to analyze each and every independent contractor versus employee relationship dispute–via the "economic realities" test from *Terry.*" Answering Brief ("AB") p. 8. Appellants, and this appeal, are not concerned with "each and every independent contractor versus employee relationship dispute." This appeal only concerns employment status for the purposes of Article 15, Section 16 of the Nevada Constitution, the Nevada Minimum Wage Amendment (the "MWA"). Appellants agree Nevada's Legislature has the power to define "employment" for purpose *other* than the MWA and by enacting NRS 608.0155 has properly exercised its power to define, for purposes other than the MWA, "independent contractor versus employee relationships." In respect to the MWA, the economic realities test, adopted by this Court in *Terry v. Sapphire Gentleman's Club*, 336 P.3d 951 (2014) is controlling as to that issue and not subject to legislative abrogation or modification.

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ARGUMENT

I. NO BASIS EXISTS TO FIND THE NTA IS GRANTED THE POWER BY NRS 706.473 TO DEFINE EMPLOYMENT FOR MINIMUM WAGE PURPOSES

The power of the Nevada Transportation Authority (the "NTA") under NRS 706.473 to allow holders of certificates of public convenience and necessity ("certificate holders") to lease taxicabs to non-certificate holders ("independent contractors") is not at issue. What is at issue is the district court's, and respondents', baseless assumption that power includes the power to define taxi drivers as "independent contractors" for minimum wage purposes. That is an assumption based on a congruence of terminology, the usage of the words "independent contractor." There is no basis in NRS 706.473, its further implementing statute NRS 706.475, anywhere else in Chapter 706, or in the legislative history or statutory scheme to support such an assumption.

The statutory scheme conferring on the NTA the power to approve taxicab leases to "independent contractors" is concerned with one thing: ensuring non-certificate holders abide by the same restrictions and obligations as the certificate holders who actually own, and would otherwise be responsible for operating, a taxicab. In erecting that statutory scheme, the Nevada Legislature has said nothing about whether a non-certificate holder "independent contractor" taxi driver could

be an "employee" for minimum wage purposes of a certificate holder or, as a result of such a lease agreement, is barred from claiming that status. The operative statutes say nothing about "taxi drivers" in the context of such taxicab leases from certificate holders to non-certificate holders. Those statutes would allow non-certificate holder lessees to never drive any of those leased taxicabs and have them driven by their own employees.

Nowhere in the text of NRS 706.473 is the NTA granted the power to define a taxicab lessee as an independent contractor as a matter of law for minimum wage purposes. Nothing indicates the NTA believes it has that power or has exercised it or has found such a power to be important to its public mission, circumstances that might be supportive of respondents' contentions. *See, Nev. Pub. Emplys. Ret. Bd. v. Smith*, 320 P.3d 560, 565 (Nev. Sup. Ct. 2013) (deference may be shown to agency's interpretation of its powers if such powers are within its statutory authority). Nor does the respondent point to anything else supporting the existence of such a power. Its argument, and the district court's finding, is just a vapid assumption of such power. It is the actual circumstances of the relationship between the lessor certificate holder and the lessee non-certificate holder driver that controls "employee" status for the purposes of the MWA, not the existence of a lease agreement approved by the NTA.

II. THIS COURT'S INTERPRETATIONS OF NEVADA'S CONSTITUTION ARE NOT SUBJECT TO "REDEFINITION" BY NEVADA'S LEGISLATURE

" . . . [C]onstitutional supremacy prevents the Nevada Legislature from creating exceptions to the rights and privileges protected by Nevada's Constitution." *Thomas v. Nevada Yellow Cab Corp.*, 327 P. 518, 522 (2014). This Court in *Terry v. Sapphire Gentleman's Club*, 336 P.3d 951 (2014) determined the meaning of employment under the MWA, a provision of Nevada's Constitution. And as it aptly stated in *Thomas*, "[i]f the Legislature could change the Constitution by ordinary enactment, "no longer would the Constitution be 'superior paramount law, unchangeable by ordinary means.' It would be 'on a level with ordinary legislative acts, and, like other acts, ... alterable when the legislature shall please to alter it.'" 327 P. 518, 522 (2014) (quoting *City of Boerne v. Flores*, 521 U.S. 507 (1997) (alteration in original) (quoting *Marbury v. Madison*, 5 U.S. 137 (1803).

Respondents, referencing the Court's discussion in *Terry* about the Nevada Legislature's historic failure to "clearly signal" its intent about whether "Nevada's minimum wage scheme should deviate from the federally set course," argues NRS 608.0155 has now provided such a "signal" and properly abrogates *Terry*. AB p. 29–30, quoting 336 P.3d at 955. While Nevada's Legislature, through 608.0155,

has provided such "clear signal" or statement of the law outside the context of the MWA, that change in the statutory scheme does not, and cannot, extend to the MWA as interpreted by this Court in *Terry*.

It is manifestly the duty "...of the judicial department to say what the law is." *Marbury* 1 Cranch at 177. This Court has discharged that duty in *Terry* and stated "what the law is" in respect to being an "employee" for the purposes of the MWA, a provision of Nevada's Constitution. The MWA grants no power to Nevada's Legislature to further amend or modify its terms. Its power to redefine Nevada's statutory scheme, in respect to what constitutes employment for purposes other than the MWA, a power relied upon by the respondents and the district court, is irrelevant. NRS 608.0155 cannot, and does not, change "what the law is" under the MWA as stated by this Court in *Terry*.

III. RESPONDENTS' ARGUMENT THE "LAW OF CONTRACTS" REQUIRES A FINDING IN ITS FAVOR IGNORES THE SUPREMACY OF STATUTORY LAW OVER ALL LEGAL RIGHTS THAT ARE NOT BASED IN THE CONSTITUTION

Respondents also argue that because "Nevada no longer adheres to the economic realities test," as a result of the enactment of NRS 608.0155, the district court ruling should be affirmed based upon the "sanctity of the law of contracts." AB p. 33. In support of this argument respondent relies upon *Kaldi v. Farmer Ins.*

Exch, 21 P.3d 16, 19–20 (Nev. Sup. Ct. 2001). *Kaldi* did not concern employment for the purposes of Nevada's minimum wage laws, the issue analyzed and determined by this Court in *Terry*.[1] *Kaldi* also pre-dates the enactment of NRS 608.0155 by 14 years.

Respondents' argument on this point is illogical, contradictory, and unsupported by any competent authority. It cites to no constitutionally secured "sanctity of contract" rights, meaning such common law rights as this Court recognized in *Kaldi* were, of course, subject to extinction by Nevada's Legislature when it enacted NRS 608.0155. Respondents also contradict themselves and urge upon this Court an illogical conclusion: that NRS 608.0155 could redefine employment for *all purposes* in Nevada, including the MWA and abrogate this Court's decision in *Terry*, yet it simultaneously lacked the power to displace the respondent's common law contract rights because of their "sanctity" arising from no cited basis.

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[1] Although academic to this appeal, *Terry* also established that the "economic realities" controlled the determination of "employment" for minimum wage purposes under Nevada law *outside* the scope of the MWA (there are a few employment relationships covered by Nevada's statutory minimum wage law and not the MWA). That branch of *Terry*, not stating "what the law is" under Nevada's Constitution, was properly abrogated by NRS 608.0155.

CONCLUSION

Wherefore, for all the foregoing reasons, the Orders and Judgment appealed from should be reversed in their entirety.

Date: October 5, 2020

Respectfully Submitted,

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Certificate of Compliance With N.R.A.P Rule 28.2

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

I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more and contains 3374 words.

Finally, I hereby certify that I have read this brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 5th day of October, 2020

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Certificate of Service

I certify that on October 5, 2020, I served a copy of the foregoing APPELLANTS' REPLY BRIEF upon all counsel of record by ECF System which served all parties electronically.

Dated this 5th day of October, 2020

/s/ Leon Greenberg
Leon Greenberg, Esq.

ADDENDUM

NEVADA STATUTES AND CONSTITUTION EXCERPTS

Nevada Constitution, Article 15, Section 16

§ 16. Payment of minimum compensation to employees
Currentness
A. Each employer shall pay a wage to each employee of not less than the hourly rates set forth in this section. The rate shall be five dollars and fifteen cents ($5.15) per hour worked, if the employer provides health benefits as described herein, or six dollars and fifteen cents ($6.15) per hour if the employer does not provide such benefits. Offering health benefits within the meaning of this section shall consist of making health insurance available to the employee for the employee and the employee's dependents at a total cost to the employee for premiums of not more than 10 percent of the employee's gross taxable income from the employer. These rates of wages shall be adjusted by the amount of increases in the federal minimum wage over $5.15 per hour, or, if greater, by the cumulative increase in the cost of living. The cost of living increase shall be measured by the percentage increase as of December 31 in any year over the level as of December 31, 2004 of the Consumer Price Index (All Urban Consumers, U.S. City Average) as published by the Bureau of Labor Statistics, U.S. Department of Labor or the successor index or federal agency. No CPI adjustment for any one-year period may be greater than 3%. The Governor or the State agency designated by the Governor shall publish a bulletin by April 1 of each year announcing the adjusted rates, which shall take effect the following July 1. Such bulletin will be made available to all employers and to any other person who has filed with the Governor or the designated agency a request to receive such notice but lack of notice shall not excuse noncompliance with this section. An employer shall provide written notification of the rate adjustments to each of its employees and make the necessary payroll adjustments by July 1 following the publication of the bulletin. Tips or gratuities received by employees shall not be credited as being any part of or offset against the wage rates required by this section.
B. The provisions of this section may not be waived by agreement between an individual employee and an employer. All of the provisions of this section, or any part hereof, may be waived in a bona fide collective bargaining agreement, but only if the waiver is explicitly set forth in such agreement in clear and

unambiguous terms. Unilateral implementation of terms and conditions of employment by either party to a collective bargaining relationship shall not constitute, or be permitted, as a waiver of all or any part of the provisions of this section. An employer shall not discharge, reduce the compensation of or otherwise discriminate against any employee for using any civil remedies to enforce this section or otherwise asserting his or her rights under this section. An employee claiming violation of this section may bring an action against his or her employer in the courts of this State to enforce the provisions of this section and shall be entitled to all remedies available under the law or in equity appropriate to remedy any violation of this section, including but not limited to back pay, damages, reinstatement or injunctive relief. An employee who prevails in any action to enforce this section shall be awarded his or her reasonable attorney's fees and costs.
C. As used in this section, “employee” means any person who is employed by an employer as defined herein but does not include an employee who is under eighteen (18) years of age, employed by a nonprofit organization for after school or summer employment or as a trainee for a period not longer than ninety (90) days. “Employer” means any individual, proprietorship, partnership, joint venture, corporation, limited liability company, trust, association, or other entity that may employ individuals or enter into contracts of employment.
D. If any provision of this section is declared illegal, invalid or inoperative, in whole or in part, by the final decision of any court of competent jurisdiction, the remaining provisions and all portions not declared illegal, invalid or inoperative shall remain in full force or effect, and no such determination shall invalidate the remaining sections or portions of the sections of this section.
Credits
Approved and ratified 2006.

N.R.S. 608.0155

608.0155. Persons presumed to be independent contractor
Currentness
1. Except as otherwise provided in subsection 2, for the purposes of this chapter, a person is conclusively presumed to be an independent contractor if:
(a) Unless the person is a foreign national who is legally present in the United States, the person possesses or has applied for an employer identification number or social security number or has filed an income tax return for a business or

earnings from self-employment with the Internal Revenue Service in the previous year;
(b) The person is required by the contract with the principal to hold any necessary state business license or local business license and to maintain any necessary occupational license, insurance or bonding in order to operate in this State; and
(c) The person satisfies three or more of the following criteria:
(1) Notwithstanding the exercise of any control necessary to comply with any statutory, regulatory or contractual obligations, the person has control and discretion over the means and manner of the performance of any work and the result of the work, rather than the means or manner by which the work is performed, is the primary element bargained for by the principal in the contract.
(2) Except for an agreement with the principal relating to the completion schedule, range of work hours or, if the work contracted for is entertainment, the time such entertainment is to be presented, the person has control over the time the work is performed.
(3) The person is not required to work exclusively for one principal unless:
(I) A law, regulation or ordinance prohibits the person from providing services to more than one principal; or
(II) The person has entered into a written contract to provide services to only one principal for a limited period.
(4) The person is free to hire employees to assist with the work.
(5) The person contributes a substantial investment of capital in the business of the person, including, without limitation, the:
(I) Purchase or lease of ordinary tools, material and equipment regardless of source;
(II) Obtaining of a license or other permission from the principal to access any work space of the principal to perform the work for which the person was engaged; and
(III) Lease of any work space from the principal required to perform the work for which the person was engaged.

The determination of whether an investment of capital is substantial for the purpose of this subparagraph must be made on the basis of the amount of income the person receives, the equipment commonly used and the expenses commonly incurred in the trade or profession in which the person engages.
2. A natural person is conclusively presumed to be an independent contractor if the person is a contractor or subcontractor licensed pursuant to chapter 624 of NRS or

is directly compensated by a contractor or subcontractor licensed pursuant to chapter 624 of NRS for providing labor for which a license pursuant to chapter 624 of NRS is required to perform and:
(a) The person has been and will continue to be free from control or direction over the performance of the services, both under his or her contract of service and in fact;
(b) The service is either outside the usual course of the business for which the service is performed or that the service is performed outside of all the places of business of the enterprises for which the service is performed; and
(c) The service is performed in the course of an independently established trade, occupation, profession or business in which the person is customarily engaged, of the same nature as that involved in the contract of service.
3. The fact that a person is not conclusively presumed to be an independent contractor for failure to satisfy three or more of the criteria set forth in paragraph (c) of subsection 1 does not automatically create a presumption that the person is an employee.
4. As used in this section:
(a) "Foreign national" has the meaning ascribed to it in NRS 294A.325.
(b) "Providing labor" does not include the delivery of supplies.
Credits
Added by Laws 2015, c. 325, § 1, eff. June 2, 2015. Amended by Laws 2019, c. 528, § 10.5, eff. July 1, 2019.
N. R. S. 608.0155, NV ST 608.0155
Current through the end of the 80th Regular Session (2019)

NRS 706.473

Leasing of taxicab to independent contractor: Authorization in certain counties; limitations; approval of agreement; liability for violations; intervention in civil action by Authority
Currentness
1. In a county whose population is less than 700,000, a person who holds a certificate of public convenience and necessity which was issued for the operation of a taxicab business may, upon approval from the Authority, lease a taxicab to an independent contractor who does not hold a certificate of public convenience and necessity. A person may lease only one taxicab to each independent contractor with whom the person enters into a lease agreement. The taxicab may be used only

in a manner authorized by the lessor's certificate of public convenience and necessity.
2. A person who enters into a lease agreement with an independent contractor pursuant to this section shall submit a copy of the agreement to the Authority for its approval. The agreement is not effective until approved by the Authority.
3. A person who leases a taxicab to an independent contractor is jointly and severally liable with the independent contractor for any violation of the provisions of this chapter or the regulations adopted pursuant thereto, and shall ensure that the independent contractor complies with such provisions and regulations.
4. The Authority or any of its employees may intervene in a civil action involving a lease agreement entered into pursuant to this section.
Credits
Added by Laws 1993, p. 2649. Amended by Laws 1997, c. 482, § 186; Laws 2011, c. 253, § 300, eff. July 1, 2011.

NRS 706.475
Leasing of taxicab to independent contractor: Regulations of Authority
Currentness
1. The Authority shall adopt such regulations as are necessary to:
(a) Carry out the provisions of NRS 706.473; and
(b) Ensure that the taxicab business remains safe, adequate and reliable.
2. Such regulations must include, without limitation:
(a) The minimum qualifications for an independent contractor;
(b) Requirements related to liability insurance;
(c) Minimum safety standards; and
(d) The procedure for approving a lease agreement and the provisions that must be included in a lease agreement concerning the grounds for the revocation of such approval.
Credits
Added by Laws 1993, p. 2649. Amended by Laws 1997, c. 482, § 187.
Notes of Decisions (1)
N. R. S. 706.475, NV ST 706.475
Current through the end of both the 31st and 32nd Special Sessions (2020) subject to change from the reviser of the Legislative Bureau.