IN THE SUPREME COURT OF THE STATE OF NEVADA

* * * *

FCH1, LLC, A NEVADA LIMITED LIABILITY COMPANY F/K/A FIESTA PALMS, LLC, D/B/A THE PALMS CASINO RESORT,

Appellant,

vs. **No. 59630**

ENRIQUE RODRIGUEZ, AN INDIVIDUAL,

Respondent.

_____/

APPEAL FROM JUDGMENT AFTER BENCH TRIAL
EIGHTH JUDICIAL DISTRICT COURT, CLARK COUNTY, NEVADA
HONORABLE JESSIE WALSH, DISTRICT JUDGE

****

APPELLANT'S REPLY APPENDIX
VOLUME 17

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INDEX TO APPELLANT'S REPLY APPENDIX

ORIGINAL

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DISTRICT COURT

CLARK COUNTY, NEVADA

* * *

ENRIQUE RODRIGUEZ, an individual,

Plaintiff,

vs.

FIESTA PALMS, L.L.C., a Nevada Limited Liability Company, d/b/a PALMS CASINO RESORT, BRANDY L. BEAVERS, individually, DOES 1 through X, inclusive, and ROE BUSINESS ENTITIES I through X, inclusive,

Defendants.

CASE NO: A531538

DEPT NO: 10

PLAINTIFF'S EXHIBIT LIST

NON-JURY TRIAL DATE: 10/25/10

Tab No.	Exhibit		
1	List of Past Medical Expenses		
2 Admit 10-27-10	Medical records and billing statement from American Medical Response (AMR 0001-4)	N	
3 ADM 10-25-10	Medical records and billing statement from Spring Valley Hospital Medical Center (Spring Valley 0001 – 0011)		
4 ADM 10-25-10	Medical records and billing statement from Desert Radiologists (Desert Radiologist 0000001-2)		
5 ADM 10-25-10	Medical records and billing statement from Shadow Emergency Physicians (Shadow Emergency 0000001-4)		
6 10-27-10	Medical records and billing statement from Associated Physicians (Associated Physicians 0000001-16)	N	
7 Admit 10-27-10	Medical records and billing statement from Open MRI of Inland Valley (OPEN MRI 0000001-4)	Y	
8 10-27-10	Medical records and billing statement from Wellness Group (Wellness Center 0000001-14)	N	
9 Admit 10-26-10	Medical records and billing statement from Vision Radiology (Vision Radiology	N	Y

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Tab No.	Exhibit		
	Consultants 0000001-3)		
10 10-27-10	Medical records and billing statement from VQ Ortho Care (VQ Orthocare 0000001-6)	N	Y
11 ↓	Medical records and billing statement from IV League Pharmacy (IV League 0000001-22)	↓	↓
12 ↓	Medical records and billing statement from Valley Hospital Medical Center (VHMC 0000001-61)	↓	↓
13 11-8-10	Medical records and billing statement from Strehlow Radiology (Strehlow 0000001-2)	N	Y
14 10-27-10	Medical records and billing statement from Insight Mountain Diagnostics (INSIGHT 0000001-24)	N	Y
15 11-3-10	Medical records and billing statement from Rancho Physical Therapy (Rancho P.T. 0000001-302)	N	Y
16 10-27-10	Medical records and billing statement from Las Vegas Neurosurgery, Orthopedics & Rehabilitation (LVNORA 0000001-34)	N	Y
17 11-8-10	Medical records and billing statement from Integrated Health Care (Integrated 0000001- 33)	N	Y
18	Medical records and billing statement from NV Sleep Diagnostics (NV Sleep 0000001- 20)		
19 11-8-10	Medical records and billing statement from Village East Drugs (Village East Drugs 0000001-11)	N	Y
20 11-8-10	Medical records and billing statement from Medical District Surgery Center (Medical District Surgery Center 0000001- 79)	N	Y
21 11-5-10	Medical records and billing statement from Beverly Tower Wilshire Advanced Imaging (Beverly Tower Imaging 0000001- 3)	N	Y
22 11-8-10	Pharmacy Record from Safeway Pharmacy (Safeway 0000001)	N	Y
23 11-5-10	Medical records and billing statement from Jacob Tauber, M.D. and George Graf, M.D. (Dr. Tauber 0000001-28)	N	Y
24 11-8-10	Medical records and billing statement from Yakov Treyzon, M.D. (Treyzon, M.D. 0000001-9)	N	Y
25 Admit 10-28-10	Medical records and billing statement from F. Michael Ferrante, M.D. (UCLA 0000001-6)	N	Y
26	Medical records and billing statement from Quality Respiratory Solutions/King Medical Supply (Quality Resp. Solu. 0000001- 24)		
27 11-8-10	Medical records and billing statement from Casiano Flaviano, M.D., Family Wellness Center (Family Wellness 0000001-3)	N	Y
28 Admit 11-5-10	Medical records and billing statement from Walter Kidwell, M.D., Pain Institute of Nevada (Kidwell 0000001-22)	N	Y
29 Admit 11-1-10	Medical records and billing statement from Olympia Anesthesia (Olympic 0000001- 10)	N	Y
30 Admit 10-28-10	Medical records and billing statement from Wilshire Surgicenter (Wilshire Surgicenter 0000001-121; Wilshire 0000001-3)	Y	Y
31	Daniel Kim, D.O., Nevada Ear, Nose & Throat (NV ENT 0001-17)		

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Tab No.	Exhibit		
32 Admit 11-1-10	Medical records and billing statement from Douglas S. Stacey, D.P.M., Foot & Ankle Surgical Group (Dr. Stacey, D.P.M. 0000001-5)	N	Y
33	Medical records and billing statement from North Valley Medical Supply (0000001- 6)		
34 11-8-10	Medical records and billing statement from Nevada Imaging Centers/Lake Mead Radiology (Lake Mead Rad. 0000001-18)	N	Y
35 Admit 11-1-10	Medical records and billing statement from Robert Gutierrez, M.D. (Robert Gutierrrez, M.D. 0000001-59)	N	Y
36 Admit 11-1-10	Craig Jorgenson, M.D., Govind Koka, D.O., Advanced Urgent Care (Advanced Urgent Care 0000001- 2)	N	Y
37 ADM. 5-28-10	Medical records and billing statement from Govind Koka, D.O., Medical Associates of Southern Nevada/Primary Care Consultants (Primary Care Consultants KOKA 0000001-330)	N	Y
38 Admit 10-28-10	Medical records and billing statement from Michael J. Crovetti, D.O., Bone & Joint Institute (Crovetti 0000001-38)	Y	Y
39 Admit 10-28-10	Medical records and billing statement from John Thalgott, M.D., Center for Disease and Surgery of the Spine (CDSS 0000001-72)	↓	↓
40 Admit 11-1-10	Medical records and billing statement from Las Vegas Surgery Center (LV Survery Center 0000001-10)	N	Y
41 Admit 11-1-10	Medical records and billing statement from Joseph J. Schifini, M.D. (Schifini 0000001-19)	Y	Y
42 Admit 10-28-10	Medical records and billing statement from Lawrence Miller, M.D., Cal Hand Surgery (Cal. Hand 0000001-86)	Y	
43 11-8-10	Medical records and billing statement from Matt Smith Physical Therapy (Dr. Matt Smith 0000001-57)	Y	Y
44 Admit 11-1-10	Medical records and billing statement from Valley Rehab. (Valley Rehab 0000001- 180)	Y	Y
45	Medical records and billing statement from Centennial Upright MRI (Centennial Upright MRI 0000001-12)	N	Y
46	Billing statement from G. Michael Elkhanich, M.D., Bone & Joint Institute (Elkhanich 000001-2)	N	Y
47 11-8-10	Pharmacy Statement from Walgreen's Pharmacy (Walgreens 0000001-75) (Redacted)	N	Y
48 AM 10-28-10	Medical records and billing statement from Thomas Vater, D.O. (Dr. Vater 0000001-18)	N	Y
49 Admit 11-1-10	Medical records and billing statement from Russell J. Shah, M.D. (Shah 0000001-81)	N	Y
50 Admit 11-1-10	Medical records and billing statement from Kelly Hawkins Physical Therapy/ Chynoweth, Hill & Leavitt (KHPT 0000001-44)	N	Y
51 Stip 11-15-10	Medical records and billing statement from Louis F. Mortillaro, Ph.D. & Associates (Mortillaro 0000001-223)	N	Y
52	Medical records and billing statement from Quest Diagnostics (Quest Diagnostics 0000001-15)		
53 Stip 11-9-10	1999 Tax Return (W-2 1999 0000001-8)	N	Y

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Tab No.	Exhibit	Obj	Admit
54 Stip 11-9-10	2001 Tax Return (W-2 2001 0000001-8)	N	Y
55 11-9-10	2004 Tax Return (W-2 2004 0000001-10)	N	Y
56	Expert Report of Terrence Dinneen (*incl. report* by Kathleen Hartmann)		
57	Expert Report of Steven T. Baker		
58 10-25-10	Palms Casino Resort security incident report (FP0118 – FP0120)	N	Y
59	Palms Casino Resort Guest/Employee Voluntary Statement by Enrique Rodriguez (FP0121)		
60	Palms Casino Resort Guest/Employee Voluntary Statement by Chris Poe (FP0122)		
61	Palms Casino Resort Guest/Employee Voluntary Statement by Josh Gonzales (FP0123)		
62 11-10-10	Waiver of Medical Treatment (FP 0124)	N	Y
63	Palms Security Manual (FP5007-5174)		
64	Security Interview Questions (FP5175 – 5178)		
65	Standard Operation Procedures until 3-2006		
66 11-5-10	Expert Report of George Becker, M.D.	N	Y
67 11-4-10	Expert Report of Thomas F. Cargill	N	Y
68 Stip 11-3-10	Expert Report of Forrest P. Franklin	N	Y
69	Plaintiff's Responses to First Set of Interrogatories		
70	Plaintiff's Responses to Second Set of Interrogatories		
71	Defendant Fiesta Palms's Responses to First Set of Interrogatories		
72	Defendant Fiesta Palms's Responses to Second Set of Interrogatories		

		Obj	Admit
73	Affidavit of Non-Service	N	10-25
74	Affidavit of Non-Service	N	10-25
75	Diagram	N	10-25
76	Contingency Agreement	Y	10/26/10
77	Rancho Physical Therapy Diagram	N	10/27/10

Pltfs **EXHIBITS** CASE NO. A531538

	OFFERED DATE	OBJ		ADMITTED	DATE
78 - Picture of Knee Surgery	10/27/10	Y	N	Y	10/27/10
78-A Picture of Knee Surgery	↓	↓	↓	↓	↓
78-B Picture of Knee Surgery					
78-C Picture of Knee Surgery					
78-D Picture of Knee Surgery					
79 - Life expectancy	11/4/10	Y	N	Y	11/4/10
80 - Table Two	11/4/10	↓	↓	↓	↓
81 - FUTURE MEDICAL CARE COST TABLE A (2 pgs)	11-4-10	Y	N	Y	11-4-10
82 FUTURE MEDICAL CARE COST TABLE B	11-4-10	Y	Y	Y	11-4-10
83 - LIFE CARE PLAN TABLE 1 (2 pgs)	11-4-10	Y	Y	Y	11-4-10
Stip Defendants Supplemental	11/4/10	Y	N	Y	11/4/10

Exhibit Sheet 5-01/jh

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FILED IN OPEN COURT
11-10-10
STEVEN D. GRIERSON
CLERK OF THE COURT
BY DEPUTY
TERI BRAEGELMANN

08A531538
MJUD
Motion for Judgment
1047382

DISTRICT COURT

CLARK COUNTY, NEVADA

* * *

ENRIQUE RODRIGUEZ, an individual, Plaintiff, vs. FIESTA PALMS, L.L.C., a Nevada Limited Liability Company, d/b/a PALMS CASINO RESORT, BRANDY L. BEAVERS, individually, DOES 1 through X, inclusive, and ROE BUSINESS ENTITIES I through X, inclusive, Defendants.	CASE NO: A531538 DEPT NO: 10 **HEARING DATE:** **HEARING TIME:**

PLAINTIFF'S RULE 50 MOTION FOR JUDGEMENT ON LIABILITY

COMES NOW, Plaintiff ENRIQUE RODRIGUEZ, by and through his attorney of record, STEVEN M. BAKER, ESQ., of the law firm of BENSON, BERTOLDO BAKER & CARTER, CHTD., and hereby files his Rule 50 Motion for Judgment on Liability

This Motion is made and based on the pleadings and papers on file herein, the following Points and Authorities and any oral argument that may be presented.

I. Introduction

Plaintiff is seeking an order, pursuant to Rule 50, for judgment as a matter of law on the issue of liability, based on the testimony of Defendant's employees and security expert, Franklin Forrest.

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II. Statement of Facts

During the course of this trial, Plaintiff has established that prior to the subject incident: Defendant was aware that promotional items were thrown into crowds; that Defendant acknowledged this behavior was inappropriate because it was a safety issue and could foreseeably cause injury to an individual; and that Defendant, despite this knowledge and awareness, constructed a "field goal" within the sports book for purposes of throwing promotional items.

Sherri Long, the Director of Marketing at The Palms testified that she was aware that promotional items were thrown into crowds; and acknowledged this behavior was inappropriate because it was a safety issue and could foreseeably cause injury to an individual.

Ms. Long reiterated her safety concerns, and specifically recalls instructing her staff that items should not be thrown into crowds during promotional events.[1]

Ms. Long acknowledged that the injuries sustained by Plaintiff were the types of injuries she was afraid could occur if promotional items were thrown into the crowd.[2]

Ms. Long further testified that what occurred in this case is exactly what she was trying to prevent when she conveyed to her staff that it was foreseeable that someone could get injured if items were thrown into the crowd.[3]

Vikki Kooinga, Risk Manager at The Palms testified that throwing items into a crowd could foreseeably cause injury to someone in the audience.

Ms. Kooinga acknowledged that throwing promotional items into the crowd was

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[1] See **Exhibit 1**, Trial Transcript Testimony of Sheri Long, October 25, 2010, 5:20 – 11:11.
[2] *Id.*, 13: 13-16.
[3] *Id.*, 14: 8-11.

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inappropriate, wrong and beneath the standard of care for the hotel protecting the safety of their patrons upon the premises.

Lastly, Ms. Kooinga testified that she would have expected Security to stop anyone from throwing items into the crowd.[4]

Importantly, Defendant's "security" expert, Forrest Franklin, acknowledged that Defendant's conduct, in allowing items to be thrown into the crowd, was "a conscious disregard of a known safety procedure."

Specifically, Mr. Franklin testified as follows:

Q. Did you read Sheri Long's deposition?

A. I did.

Q. Do you know who Sheri Long is?

A. She's the Director of Marketing.

Q. Right. Sheri Long, she was the promotional director, marketing director; is that right?

A. That's what I understand.

Q. And you read that she found out that items were being thrown in another room, the Key West Room, and that pissed her off. You read that, right?

A. So the statement that she knew of one other occasion where items were thrown yes.

Q. Did you see her statement where she said that that created a foreseeable possibility of people being injured?

A. I'm sorry, Counsel, you said "pissed her off"?

Q. Yes,

A. I didn't read that anywhere.

---

[4] See **Exhibit 2,** Trial Transcript Testimony of Vikki Kooinga, October 25, 2010, 7: 20 – 11:1.

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Q. Did you see that she said it was inappropriate?

A. Yes.

Q. Did you see where she said it created a foreseeable risk of harm to patrons?

A. She said it was a safety issue, as I recall.

Q. She said it was absolutely a safety concern, But do you recall reading where she said it created a foreseeable risk of injury to people in the sports bar?

A. I saw that.

Q. Did you hear, or did anyone tell you from her testimony in this court, that she said that it was a breach I the standard of care for it to be done?

A. I haven't seen that.

Q. Okay. Well, did you read Brandy Beaver's deposition?

A. I did.

Q. And did you hear her say that -- oh, let me ask you something about Sheri Long. Did you read where Sheri Long had a meeting with her staff, including Denise something with a D.

Do you remember her name, a woman named Denise. And specifically instructed Denise that promotional items were no longer to be thrown?

A. I don't recall that.

Q. You don't recall that in Brandy Beaver's deposition? Can I remind you?

A. Sure.

MR. BAKER: Page 64 only. Would you spell that name into the record, please, Rob.

MR. CARDENAS: Denise Demoncas, D-e-m-o-n-c-a-s, is the last name.

MR. BAKER: No the quote that has to do with that -- oh, it's in Sheri Long's deposition.

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If you'll give me just a moment.
[Pause]

BY MR. BAKER:
Q. And I'll read it to you, and this is on page 63 -- 53 to 54 of the deposition. She said:

"Q. At the time in the Key West Room when you discovered someone was throwing promotional items out into the crowd, who was it you spoke to?

"A. I'm sure it was the marketing manager.

"Q. Who was it at that time?

"A. I believe it was Maureen.

"Q. Do you remember the substance of the conversation?

"A. No, we don't recall.

"Q. But you discussed it wasn't safe to throw promotional items out into the crowd?

"A. I believe that's so, right.

"Q. For the reasons that you said there's a real safety concern?

"A. Yes.

"Q. And because it's foreseeable that if you throw promotional items out during Monday night football someone could get hurt?

"A. Correct.

"Q. And, okay, did you follow-up with a memoranda to your department?"

She says she doesn't remember doing that.
Sir, are you aware that she spoke with people in her marketing department that promotional items should not be thrown out into the crowd?

A. I seem to recall it, yes.

Q. Okay. Are you aware that Brandy Beavers had a

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meeting with Denise Demoncas after that, where they actually constructed a goal post so that promotional items could be thrown through the sports bar?

A. Yes.

Q. And you're aware that that occurred after Sheri Long instructed her staff that promotional items should not be thrown?

A. Sure.

Q. Okay. Now when Sheri Long told them, promotional items shouldn't be thrown, she was implementing, as she said,a safety protocol, a safety procedure; is that right?

A. It could be.

Q. Yeah. And Denise thereafter met with Brandy Beavers after being told that promotional items were not to be thrown, and constructed goals posts so that promotional items could be thrown through the sports bar; is that fair to say?

A. That is fair to say.

Q. Does that sound to you like a conscious disregard then of that safety procedure?

A. It wasn't a safety procedure.

Q. You just said it was a safety procedure, when Sheri Long said: "promotional items should not be thrown," that was a safety procedure, right?

A. I'll concede that, then.

Q. Okay. And so when Denise, after that time, met with Brandy Beavers and said: Hey, we got a great idea, let's put up football goal posts in the middle of the sports bar to throw promotional items, wouldn't that appear to you to be a conscious disregard of a known safety procedure?

A. Okay.

Q. Okay. And so you agree to that?

A. Yes.[5]

[5] See **Exhibit 3,** Trial Transcript Forrest Franklin Testimony, November 3, 2010, 23:15 -

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III. Legal Argument

Under NRCP 50(a)(1), the district court may grant a motion for judgment as a matter of law if the nonmoving party "has failed to prove a sufficient issue for the jury." Similarly, the district court may deny the motion if the nonmoving party has presented sufficient evidence such that the jury could grant relief to that party.[6] In ruling on the "motion for judgment as a matter of law, the district court must view the evidence and all inferences in favor of the nonmoving party."[7]

Plaintiff submits that the issue of liability has been definitively established through the testimony of Ms. Long, Ms. Kooinga, and Mr. Franklin, Defendant's expert.

Defendant was aware that promotional items were thrown into crowds. Defendant has acknowledged this behavior was inappropriate because it was a safety issue and could *foreseeably* cause injury to an individual. Defendant acknowledged that the behavior was wrong and fell below the standard of care for the hotel protecting the safety of their patrons upon the premises.

Despite this awareness, Defendant constructed a field goal in the sports book for purposes of promotional items to be thrown, in direct violation of its prohibition against items being thrown into the crowd.

Plaintiff submits that the evidence and testimony elicited during trial not only demonstrates "conscious disregard," but clear liability.

Defendant's only liability argument, through their expert, is that there is no standard of care relative to throwing items into the crowd exists. Of course this position completely ignores the pertinent testimony of Ms. Long and Ms. Kooinga, both of whom acknowledged

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28: 2

[6] Fernandez v. Admirand, 108 Nev. 963, 968, 843 P.2d 354, 358 (1992).

[7] Nelson v. Heer, 123 Nev. 26, ----, 163 P.3d 420, 424 (2007).

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that a policy prohibiting items being thrown into crowds was established and ignored. Moreover, the position further ignores the legal theory of assumption of duty.

Nevada recognizes the so-called "good Samaritan" rule, see generally, e. g., Prosser, Handbook of the Law of Torts s 56, at 343-48 (4th ed. 1971), whereby one who undertakes, whether gratuitously or for consideration, to render services to another is held liable for negligent rendering of those services if the negligence causes injury either to the person on whose behalf the services are being performed or to a foreseeable third party.[8] This rule is articulated in Restatement (Second) of Torts ss 323 & 324A (1965), which states as follows:

> Section 323 Negligent Performance of Undertaking to Render Services
>
> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from failure to exercise reasonable care to perform his undertaking, if(a) his failure to exercise such care increases the risk of such harm, or(b) the harm is suffered because of the other's reliance upon the undertaking. (emphasis added).
>
> Section 324 A provides:Liability to Third Person for Negligent Performance of Undertaking
>
> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if(a) his failure to exercise reasonable care increases the risk of such harm, or(b) he has undertaken to perform a duty owed by the other to the third person, or(c) the harm is suffered because of reliance of the other or the third person upon the undertaking. (emphasis added).

As set forth above, Defendant undertook a duty, i.e., prohibiting items to be thrown into the crowd, and implemented a policy prohibiting the same. They knowingly violated said policy, and their expert has testified that their conduct was a "conscious disregard of known safety procedure." Liability is firmly established and Plaintiff is entitled to a Rule 50

[8] Dow Chemical Co. v. Mahlum, 114 Nev. 1468, 1506, 970 P.2d 98, 123 (1998), overruled in part on other grounds by GES, Inc. v. Corbitt, 117 Nev. 265, 21 P.3d 11 (2001).

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determination.

III. Conclusion

In this case, Defendant has failed to establish a sufficient issue for your Honor to determine relative to liability.

Dated this 10 day of Nov, 2010.

BENSON, BERTOLDO, BAKER & CARTER

#7301/6v

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CLERK OF THE COURT

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DISTRICT COURT

CLARK COUNTY, NEVADA

ENRIQUE RODRIGUEZ,

Plaintiff,

v.

FIESTA PALMS, LLC, a Nevada Limited Liability Company, d/b/a THE PALMS CASINO RESORT, et al. ,

Defendants.

Case No. A531538

DEFENDANT'S OPPOSITION TO PLAINTIFF'S RULE 50 MOTION FOR JUDGMENT ON LIABILITY

Hearing Date: December 15, 2010
Hearing Time: 10:00 a.m.
Dept: 10

I.
ARGUMENT

As a threshold matter, NRCP 50 is only appropriate for matters tried to a jury. There is procedurally no point to a rule 50 motion in a bench trial. Under Rule 50 a court may grant a motion for judgment as a matter of law only if the non-moving party fails to prove a sufficient issue *for the jury*, such that his claim cannot be maintained under the controlling law. *Nelson v. Heer*, 123 Nev. 217, 222 (2007). In applying that standard and deciding whether to grant a motion for judgment as a matter of law, the district court must *view the evidence and all*

inferences in favor of the nonmoving party. *Id.*

Plaintiff's asking the Court to make such a determination in this bench trial makes no sense. The court should deny plaintiff's motion and decide the matter on the merits.

A. Tossing promotional items at promotional events is within industry standard of care

Taking the evidence and all inferences logically flowing therefrom in the light most favorable to the nonmoving party, the Palms' liability expert's testimony clearly establishes that the Palms' independent contractor's throwing a plastic water bottle during a promotional event does not breach the applicable industry standard of care. The Palms' evidence at trial, presented through its security/hospitality expert Forrest Franklin, established that it is in fact within the industry standard of care to toss promotional items at promotional events:

> Moreover, throwing souvenirs into crowds is a standard practice in a host of event types, Cirque de Soleil, Teatro Zinzanni, even Blue Men who addition to solid substance, spew all manner of lubricants and other foreign liquids into their audiences. And who has not been to a baseball game, or seen one on television wherein foul balls, home runs, bats or broken pieces thereof, all manner of food stuffs, and the team mascot's products, often from a moving vehicle, jettisoned into the crowd, causing anticipated jostling and bodily contact, and all this with great fanfare often replayed on the field jumbotron? In my opinion Brandy Beavers' and Palm Girls' actions were not "unreasonably dangerous to the patrons of the Sports Book (or) in particular to Plaintiff...", nor did they fall below any perceived standard of behavior, hire, training or retention.

Franklin August 19, 2010 Expert Report, at 2. In any event, the item was on the ground at the time the unidentified woman dove for it. Mr. Franklin's expert report has been admitted into evidence as Exhibit 68.

Franklin's testimony confirms this:

> Q Okay. Now the concept of throwing articles, memorabilia, whatever, into crowds, is that something that you were familiar with?
> A I have been all my security career, yes, sir.
> Q Okay. And, I mean, you didn't say: Oh, my goodness, I've never heard of anybody doing this?
> A Let me do it another way. I never -- I've hardly ever heard of anybody not doing it.

Franklin November 3, 2010 Trial Testimony, p. 13, lns. 14-21. Also,

Q Okay. And what opinion did you come to?
A That throwing memorabilia as a promotional effort into crowds is not a substandard protocol.

Franklin November 3, 2010 Trial Testimony, p. 14, lns. 6 - 8. Opposing counsel was able to cross examine Mr. Franklin, and elicit testimony as quoted in his motion papers. However, and especially considering the testimony under the Rule 50 standard – considering the evidence and inferences flowing therefrom in the light most favorable to the nonmoving party – Mr. Franklin's ultimate opinion is that throwing memorabilia as promotional efforts into crowds is "not a substandard protocol." The fact that he also opined that the Palms appeared to have breached its own procedure is not conclusive as to liability for breaching the appropriate standard of care:

REDIRECT EXAMINATION
BY MR. WARD:
Q Mr. Franklin, if all of those things that Mr. Baker just said to you were true, then that suggests that someone violated the rules; is that correct?
A Yes.
Q Okay. With respect to the safety, is it your opinion as a security expert and a crowd control expert that it is unsafe to throw things into crowds?
A It's my opinion it's not unsafe to throw things into crowds.
Q So do you see any evidence that anyone conscientiously disregarded the safety of people?
A No, I don't.
Q And do you agree, you heard the testimony of Ms. Colinga, about the foreseeability of injury; do you agree with that?
A No.
Q Do you think that it is -- that the tossing of promotional items into crowds presents a foreseeable possibility of injury?

Franklin's answer was "No". *Id.* at 31:11 – 32:7. Plaintiff's motion should be denied.

B. Defendant's internal policies do not raise the standard of care/legal duty owed to plaintiff

The remainder of plaintiff's argument on this motion is as follows: Defendant, by instituting a policy forbidding the throwing of items at promotional events, has in effect "set" its own applicable standard of care, regardless of what Forrest Franklin might have testified to. Further, defendant, by breaching its own policy, has in effect breached its own self-created, heightened standard of care, thus establishing its own liability. This is not the law.

As set out immediately above, according to the Palms' expert Forrest Franklin tossing items in a promotional event is within the standard of care in the casino/hospitality industry. As established at trial, at least a year to two years before this incident, Defendant's promotional director Ms. Long instituted an oral policy preventing tossing promotional items at promotional events. While the industry standard of care according to Mr. Franklin was met, the Defendant's internal policy was breached here by Brandy Beavers, an independent contractor. Plaintiff has attempted to "re-define" the standard of care upwards based on the Defendant's violation of its own internal policies. This is not the law.

While breach of an internal policy that is stricter than the industry standard of care can be considered by the trier of fact as some evidence of negligence, such a breach is not prima facie evidence of negligence. Likewise, a defendant's instituting of an internal policy that is stricter than the industry standard does not "heighten" the legal standard of care, and violation of such an internal policy does not establish negligence.

The only Nevada case on point is *K-Mart v. Washington,* 109 Nev. 1180 (1993) (overturned in part for unrelated reasons).[1] In that case, plaintiff sued Kmart for false imprisonment. Plaintiff sought to admit Kmart's loss prevention manual into evidence to show

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[1] The *K-mart* court cited to a Georgia case, *Luckie v. Piggly Wiggly*, 173 Ga. App. 177 (1984). In that case, plaintiff sued a grocery store for false imprisonment. A Georgia statute set the standard of care, providing a defense to owners if they acted with "reasonable prudence." At trial, plaintiff sought admission into evidence of store's internal policies regarding dealing with shoplifters. The trial court excluded the evidence. The Georgia Court of Appeals found the store's private guidelines to be "illustrative" of what might constitute reasonable prudence. The court held the evidence is admissible for the limited purpose of illustrating the applicable standard. However, compliance with one's own guidelines would not conclusively establish "reasonableness," nor would failure to comply demonstrate "unreasonableness" *per se.*

that Kmart did not meet its own standards and thus breached the standard of care in detaining the plaintiff. In opposition, Kmart argued that the manual created a higher standard of care than that imposed by Nevada law, and that it was not legally required to hew to its loss prevention manual in every circumstance, but only to the legal duty of care.

On review, the Nevada Supreme Court noted that in negligence cases, self-imposed guidelines and internal policies are generally admissible as relevant to the issue of failure to exercise due care. The self-imposed guidelines and internal policies were not conclusive of the legal standard of care. *Id.* The Court held that the manual was admissible on the issue of the reasonableness of the merchant's behavior, but the jurors were instructed not to hold Kmart to its own manual standards. They were free to weigh the evidence against Kmart's own evidence that reasonable force was customary in the industry.

Similar to the *Kmart* case, that the tossing of items during promotional events may have occurred does not establish that the Defendant breached the applicable standard of care. This remains a fact issue for the trier of fact based on the evidence presented at trial.

Plaintiff argues that the Palms breached Nevada's Good Samaritan rule. This is, to say the least, an ambitious application of this principle, but the Palms feels it necessary to address it to avoid confusion and keep the record on appeal clear. The Good Samaritan rule, as the Court is well aware, applies in a situation where one undertakes to render services to someone else that are necessary for the protection of the others person or property. The classic example is helping someone in need, e.g., helping someone lying by the side of the road who had been beaten and robbed. The law only requires, in essence, that the person undertaking to help another do so nonnegligently. The Good Samaritan rule does not apply to premises liability situations. Plaintiff is attempting to replace applicable premises liability standards with the Good Samaritan rule. This is not the law.

II.
CONCLUSION

As the Court is no doubt aware, plaintiff's motion for judgment on liability is supplemental briefing on legal issues, in an attempt to persuade the Court to rule in a certain

fashion. Defendant respectfully requests this Court deny Plaintiff's Rule 50 Motion for Judgment on Liability and decide the case on the merits. .

Dated: November 20, 2010

ARCHER NORRIS

Kenneth C. Ward
Attorneys for Defendant
FIESTA PALMS, LLC, a Nevada Limited Liability Company, d/b/a THE PALMS CASINO RESORT

CERTIFICATE OF MAILING

Name of Action: Enrique Rodriguez v. Fiesta Palms, LLC
Court and Action No: District Court, Clark County, Nevada Action No. A531538

I, Tracy Pico, declare that I am over the age of eighteen years and not a party to this action or proceeding. My business address is 2033 North Main Street, Suite 800, PO Box 8035, Walnut Creek, California 94596-3728. On November 23, 2010, I caused the following document(s) to be served: **DEFENDANT'S OPPOSITION TO PLAINTIFF'S RULE 50 MOTION FOR JUDGMENT ON LIABILITY**

☒ by placing a true copy of the document(s) listed above, enclosed in a sealed envelope, addressed as set forth below, for collection and mailing on the date and at the business address shown above following our ordinary business practices. I am readily familiar with this business' practice for collection and processing of correspondence for mailing with the United States Postal Service. On the same day that a sealed envelope is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service with postage fully prepaid.

☐ by having a true copy of the document(s) listed above transmitted by facsimile to the person(s) at the facsimile number(s) set forth below before 5:00 p.m. The transmission was reported as complete without error by a report issued by the transmitting facsimile machine.

☐ by placing a true copy of the document(s) listed above, in a box or other facility regularly maintained by Federal Express, an express service carrier, or delivered to a courier or driver authorized by the express service carrier to receive documents, in an envelope designated by the express service carrier, with delivery fees paid or provided for, addressed as set forth below.

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I declare under penalty of perjury that the foregoing is true and correct. Executed on November 23, 2010, at Walnut Creek, California.

Tracy Pico

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DISTRICT COURT

CLARK COUNTY, NEVADA

* * *

ENRIQUE RODRIGUEZ, an individual, Plaintiff, vs. FIESTA PALMS, L.L.C., a Nevada Limited Liability Company, d/baa/a PALMS CASINO RESORT, BRANDY L. BEAVERS, individually, DOES 1 through X, inclusive, and ROE BUSINESS ENTITIES I through X, inclusive, Defendants.	CASE NO: A531538 DEPT NO: 10 **HEARING DATE: 12/15/10** **HEARING TIME: 10:00 a.m.**

PLAINTIFF'S REPLY TO OPPOSITION TO PLAINTIFF'S RULE 50 MOTION FOR JUDGMENT ON LIABILITY

Defendant's argument is interesting: NRCP 50 does not apply in this case because it was a bench trial. In other words, a non-moving party is never required to prove a sufficient issue for the finder of fact, so long as it is a bench trial.

Interestingly, while Defendant's opposition to each of the legal arguments set forth in Plaintiff's Motion is simply a cursory "this is not the law," they offer no legal authority to

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support their positions. In fact, the only case cited by Defendant[1], supports Plaintiff's argument.

Plaintiff re-iterates that the issue of liability has been definitively established through the testimony of Ms. Long, Ms. Kooinga and Mr. Franklin, Defendant's expert, and that this Court, as the trier of fact and law "may determine the issue against" the Defendant.

I. Defendant Failed to Present Sufficient Evidence to Defeat Liability

Under NRCP 50(a)(1), the district court may grant a motion for judgment as a matter of law if the opposing party "has failed to prove a sufficient issue for the jury," so that his claim cannot be maintained under the controlling law. The standard for granting a motion for judgment as a matter of law is based on the standard for granting a motion for involuntary dismissal under former NRCP 41(b)[2]. In applying that standard and deciding whether to grant a motion for judgment as a matter of law, the district court must view the evidence and all inferences in favor of the nonmoving party.[3] To defeat the motion, the nonmoving party must have presented sufficient evidence such that the jury could grant relief to that party.[4]

Plaintiff submits that liability has been conclusively established even when viewing the evidence and all inferences in favor of Defendant.

II. Unequivocal Testimony and Undisputed Facts Establish Liability

The unequivocal testimony and undisputed facts establishe liability and are as follows:

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[1] *Kmart v. Washington*, 109 Nev. 1180 (1993).

[2] See NRCP 50 (indicating within the drafter's note to the 2005 amendment that the revised rule incorporates language from former NRCP 41(b) and, thus, the same standard applies); NRCP 41(b) (2005).

[3] *Chowdhry v. NLVH, Inc.*, 109 Nev. 478, 482, 851 P.2d 459, 461-62 (1993) (applying the same evidence inferences to a motion under former NRCP 41(b) and a motion under former NRCP 50(a)); see *also Bliss v. DePrang*, 81 Nev. 599, 601, 407 P.2d 726, 727 (1965) (applying same inferences to a motion under former NRCP 50(a)); *Kline v. Robinson*, 83 Nev. 244, 247, 428 P.2d 190, 192 (1967) (applying the same inferences to a motion under former NRCP 41(b)).

[4] *Fernandez v. Admirand*, 108 Nev. 963, 968, 843 P.2d 354, 358, (1992).

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1. Defendant was aware promotional items were being thrown into crowds;

2. Defendant acknowledged that throwing promotional items into crowds was inappropriate;

3. Defendant acknowledged that throwing promotional items into crowds was a safety concern as it could foreseeably cause injury to an individual;

4. Despite this awareness, Defendant constructed a goal post in the sports book for purposes of promotional items to be thrown;

5. Defendant's expert testified that Defendant's conduct was a "conscious disregard of a known safety procedure."

Plaintiff submits that liability is firmly established.

III. Defendant's Conduct Evidences Negligence

Defendant's principle legal argument is that the Defendant's breach of its procedures is not conclusive as to liability. This of course ignores Defendant's own expert's testimony that the conduct was a "conscious disregard of a known safety procedure."

Plaintiff submits that *Kmart v. Washington*[5], cited by Defendant, supports his liability position.

First, Defendant's have conceded that there was a known safety procedure prohibiting promotional items from being thrown into the crowds.

Second, Defendant's conceded that they violated this known safety procedure.

Third, the known safety procedure was certainly admissible as relevant to the issue of liability[6].

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[5] *Id.*
[6] *Id.*; see also, *K Mart Corp. v. Ponsock*, 103 Nev. 39, 732 P.2d 1364 (1987).

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Plaintiff submits that the Defendant's policy and the breach thereof, both aid this Court, as the finder of fact, in determining the issue of liability.[7] This Court is free to assign whatever weight it wishes to the policy and breach.[8]

Lastly, Defendant has referenced a Georgia case[9], which stands for the proposition that self-imposed rules are not *negligence per se*. Plaintiff is not arguing a *negligence per se* standard; rather, as set forth by *Kmart*[10], and referenced by *Luckie*[11] and supportive Georgia authority,[12] the violation of self-imposed rules, while not negligence per se, is admissible as illustrative of negligence.

The undisputed evidence in the trial was that the Defendant's policy was knowingly breached, with conscious disregard. Liability could not be more conclusive.

IV. Conclusion

An action predicated upon negligence involves application of such principles as "ordinary care," and "acts of an ordinary prudent man," which are variable terms, according to the situation upon which they operate. Any evidence as would conceivably be illustrative of what might constitute the exercise of ordinary care in the specific situation at issue, including private guidelines, policies and/or self-imposed rules is relevant and admissible for whatever consideration in that regard the finder of fact, in this case, Your Honor, wishes to give to it.

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[7] *Kmart v. Washington*, 109 Nev. 1180 (1993).
[8] *Id.*
[9] *Luckie v. Piggly Wiggly*, 173 Ga. App. 177 (1984).
[10] 109 Nev. 1180 (1993).
[11] 173 Ga. App. 177 (1984).
[12] *Georgia Railroad v. Williams*, 74 Ga. 723; *Chattanooga, R. & C. R. Co. v. Whitehead*, 90 Ga. 47, 15 S.E. 629; *Atlanta Consolidated Street Ry. Co. v. Bates*, 103 Ga. 333, 30 S.E. 41; *Foster v. Southern Ry. Co.*, 42 Ga.App. 830-832, 157 S.E. 371; *Pollard v. Roberson*, 61 Ga.App. 465-471, 6 S.E.2d 203; *Callaway v. Pickard*, 68 Ga.App. 637, 23 S.E.2d 564; *Southern Ry. Co. v. Tiller*, 20 Ga.App. 251, 92 S.E. 1011.

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Safety standards in place, based on the foreseeability of injury, were knowingly violated. The violation of said standards was the direct and proximate cause of Plaintiff's injuries. The violation and conduct has been conceded to be a "conscious disregard of a known safety procedure."

Plaintiff submits that the undisputed evidence and unequivocal testimony of the Defendant and its expert clearly and conclusively establishes liability.

DATED this 8th day of Dec, 2010.

BENSON, BERTOLDO, BAKER & CARTER

BY: _____

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CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of December, 2010, I served a copy of the foregoing document via 1st Class, U.S. Mail, postage thereon fully prepaid to the following:

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DISTRICT COURT

CLARK COUNTY, NEVADA

* * *

ENRIQUE RODRIGUEZ, an individual, Plaintiff, vs. FIESTA PALMS, L.L.C., a Nevada Limited Liability Company, d/b/a PALMS CASINO RESORT, BRANDY L. BEAVERS, individually, DOES 1 through X, inclusive, and ROE BUSINESS ENTITIES I through X, inclusive, Defendants.	CASE NO: A531538 DEPT NO: 10 **BENCH TRIAL DATE: 10/25/10** **HEARING DATE: 1/31/11**

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

THIS MATTER having come on for hearing on January 31, 2011 with respect to Plaintiff's Rule 52 (erroneously designated "Rule 50") Motion on the Issue of Liability before the Honorable Jessie Walsh, presiding, and the Court having considered the evidence and the arguments of counsel and taken the matter under advisement for further consideration, it is hereby found and concluded as follows:

FINDINGS OF FACT

During the course of this trial, Plaintiff established that, prior to the subject incident, Defendant was aware that promotional items were being thrown into crowds at events on the

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premises; that Defendant knew this behavior was inappropriate because it was a safety issue and could foreseeably cause injury to an individual; that prior to the incident at bar, Defendant conducted a staff meeting where staff was instructed not to cause promotional items to be thrown into crowds because of said safety concerns; and that Defendant, despite this knowledge and awareness, constructed a "field goal" within the sports book for purposes of throwing promotional items at sporting events.

Sheri Long, the Director of Marketing at The Palms, testified that she was aware that promotional items were thrown into crowds before the subject incident; this witness acknowledged this behavior was inappropriate because it constituted a safety issue which could foreseeably cause injury to an individual.

In her testimony, Ms. Long specifically recalled holding a meeting, before the subject incident, and instructing her staff that items should not be thrown into crowds during promotional events.

Ms. Long acknowledged that the injuries suffered by Plaintiff were exactly of the type she was concerned would occur if promotional items were thrown into crowds at promotional events.

Ms. Long further testified that what occurred in this case is what she was trying to prevent when she conveyed to her staff that promotional items were not to be thrown into a crowd at an event.

Vikki Kooinga, Risk Manager at The Palms, also testified that throwing items into a crowd could foreseeably cause injury to someone in the audience.

Ms. Kooinga acknowledged that throwing promotional items into the crowd was inappropriate, wrong and beneath the standard of care for the hotel in protecting the safety of their patrons upon the premises.

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Lastly, Ms. Kooinga testified that she would have expected hotel Security to stop anyone from throwing items into the crowd.

Plaintiff was then injured when promotion items were thrown into the crowd at a promotional event.

CONCLUSIONS OF LAW

NRCP 52(c) states in pertinent part as follows:

> If during a trial without a jury a party has been fully heard on an issue and the court finds against the party on that issue, the court may enter judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue, or the court may decline to render any judgment until the close of all the evidence.

Liability has been conclusively established by the Plaintiff in this matter. The unequivocal testimony and undisputed facts establish liability and are as follows:

1. Defendant was aware promotional items were being thrown into crowds at events before the incident at bar;

2. Defendant conducted a staff meeting prior to the incident at bar where staff was instructed not to cause or permit promotional items to be thrown into crowds at events;

3. Defendant acknowledged that throwing promotional items into crowds was inappropriate;

4. Defendant acknowledged that throwing promotional items into crowds was a safety concern as it could foreseeably cause injury to an individual;

5. Defendant acknowledged that said forseeable risk of injury was known by them prior to the incident at bar;

6. Despite this awareness, after said staff meeting, and with knowledge of said foreseeable risk of harm, Defendant constructed a goal post in the sports book for purposes of promotional items to be thrown;

7. Plaintiff was then injured as a direct and proximate result of throwing promotional items at an event upon Defendant's premises.

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Additionally, Defendant has conceded that there was a known safety procedure prohibiting promotional items from being thrown into the crowds.

Defendant's conceded that they violated this known safety procedure as related to the case at bar.

The known safety procedure was admissible as relevant to the issue of liability.

Defendant's policy and the breach thereof both aided this Court, as the finder of fact, in determining the issue of liability. No comparative liability was found on the part of the Plaintiff.

Therefore, this Honorable Court finds and adjudges liability against Defendant PALMS CASINO RESORT and in favor of the Plaintiff ENRIQUE RODRIGUEZ herein. These findings and conclusions are made and based upon the weight of the testimony and evidence aforesaid, and is reached independently of any other finding, ruling, or conclusion of the Court.

DATED this 7th day of February, 2011.

BENSON, BERTOLDO, BAKER & CARTER

BY: _____

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ORDER

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Plaintiff's Rule 52 (erroneously designated "Rule 50") Motion on the Issue of Liability is granted.

Date: 3/2/11

DISTRICT COURT JUDGE