IN THE SUPREME COURT

FOR THE STATE OF NEVADA

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| DR. JOEL SLADE,<br><br>Plaintiff/Appellant,<br><br>vs.<br><br>CAESARS ENTERTAINMENT CORPORATION, PARIS LAS VEGAS OPERATING COMPANY, LLC, d/b/a PARIS LAS VEGAS, AND CAESARS ENTERTAINMENT OPERATING COMPANY, INC.,<br>Defendants/Appellees | Supreme Court Case No. 62720 |



On Appeal from the Eighth Judicial District Court
Clark County, Nevada

# APPELLANT'S OPENING BRIEF ON APPEAL

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## IV. JURISDICTIONAL STATEMENT

Appellant, Dr. Joel Slade ("Plaintiff"), appeals the district court's grant of a Motion to Dismiss brought by Appellees ("Defendants"), which disposed of the entire action. Joint Appendix [hereafter "JA"] pp. 111-112. This is an appeal of a final order. *See Lee v. GNLV Corp.*, 116 Nev. 424, 427-28, 996 P.2d 416 (2000)(Order which adjudicates the rights and liabilities of all parties and disposes of all issues presented in case is final, appealable judgment). This Court has jurisdiction under NRAP 3A(b)(1).

Pursuant to NRAP 4(a)(1) and 26(c), this appeal is timely filed. The notice of entry of the order appealed from was served by mail on February 6, 2013. JA p. 114. Plaintiff, thus, had 33 days, until March 7, 2013, to file the notice of appeal.[1] JA p. 117. The notice of appeal was filed with the district court clerk on February 28, 2013. JA p. 094.

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[1]NRAP 4(a)(1) provides 30 days from the date of service for the appeal and NRAP 26(c) allows an additional 3 days to this prescribed service as the notice of entry of judgment was not delivered on the date of service, i.e., the notice was served by mail.

## V. STATEMENT OF THE CASE

This appeal raises three issues of import never before addressed by the Nevada Supreme Court. While the common law is clear on two of these issues, in recent times the state's largest industry has ignored this common law and a more recent statutory mandate. Because of this conflict between the actual law and the gaming industry's skewed perception of the law, the matter cries out for a thorough and reasoned decision through which casinos and patrons can order their actions. The issues presented are: 1) Whether Nevada adopts and applies the common law of innkeepers requiring them to accept guests properly presenting themselves, or applies a rule at variance with the common law of all other jurisdictions; 2) Whether there exists a common law duty of casinos, open to the public, to grant access to the general public; and 3) Whether, regardless of the common law duty, the legislature has mandated that casinos grant access for entertainment purposes to patrons properly presenting themselves?

Plaintiff is a medical doctor of good repute. Complaint, ¶ 5, JA p. 2, accord Complaint, ¶¶ 14 and 23, JA pp. 2 and 4, respectively. Without cause or reason, let alone good cause or reason, he received correspondence telling him that if he was found present in any premises of the gaming licensees affiliated with Defendants, Caesars Entertainment Corporation ("Caesars") or Caesars Entertainment Operating Company ("Operating"), he would be arrested for

trespassing. Complaint, ¶ 15, JA p. 3. Thus, he has been forbidden guest status, under threat of arrest, at all Caesars affiliated hotels and casinos.

Plaintiff had planned on attending a professional conference at a licensed casino operated by Paris Las Vegas Operating Company ("Paris"), and the correspondence prevented him from doing so. Complaint, ¶ 7, JA p. 2. Plaintiff also plans future visits to Las Vegas, which visits include the attendance at other professional conferences at hotels operated by Defendants. Id. Plaintiff sues to lift this bar and for damages arising out of Defendants' breach of its statutory, common law, and regulatory mandate that the Defendants not deny access without good cause. Complaint, JA 1-9.

## VI. STANDARD OF REVIEW

A motion to dismiss under NRCP 12(b)(5) "is subject to a rigorous standard of review on appeal. The court is to recognize all factual allegations in the complaint as true and draw all inferences in favor of the complaint stating a cause of action. The dismissal should be granted only if it appears beyond a doubt that Plaintiff could prove no set of facts, which, if true, would entitle it to relief. The district court's legal conclusions de novo. Buzz Stew, LLC v. City of N. Las Vegas, 124 Nev. 224, 227-28, 181 P.3d 670, 672 (2008) (citations omitted).

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## VII. STATEMENT OF FACTS

The current appeal involves a dismissal for failure to state a claim upon which relief can be granted. JA p. 11. This occurred even before an answer. Thus, the facts to be considered are the facts stated in the Complaint, and no other. Buzz Stew, supra.

Briefly, these pertinent facts are as follows:

1. Plaintiff is a licensed medical doctor and specialist. Complaint, ¶ 5, JA p. 2.
2. Plaintiff's visits to Las Vegas are often in conjunction with symposiums, conventions and/or seminars being held within his profession. Complaint, ¶ 6, JA p. 2.
3. Oftentimes Defendants host the sponsors of these events at properties affiliated with the Defendants, and Plaintiff attended in the past, and desires to attend in the future, such events at Paris and other venues affiliated with Caesars and Operating. Complaint, ¶ 7, and exhibit 1, JA pp. 2 and 11, respectively.
4. Plaintiff has frequented casinos affiliated with Caesars since, at least, 1994, without incident. Complaint, ¶¶ 10 and 14, JA pp. 2 and 3.
5. In 2011, for example, per records of one of the Defendants, entities affiliated with Caesars earned a gross amount approaching $40,000.00 from the Plaintiff in 2011. Complaint, ¶ 13, JA p. 3.

6. Plaintiff never acted disorderly within any company affiliated with Caesars, never undertook anything to cause injury to any company affiliated with Caesars, and never suffered a complaint of any nature relative to his play, his actions as a guest, or other circumstance surrounding any company affiliated with Caesars. Complaint, ¶ 14, JA p. 3.

7. In the summer of 2011, Plaintiff received a letter from a casino affiliated with Caesars written by one Greg Hinton and on the letterhead of Harrah's Casino & Hotel, Tunica, stating that Plaintiff has been evicted from that casino, and further providing, "This is an eviction that will be enforced at all Caesar's Entertainment owned, operated, or managed properties throughout the entire Caesars Entertainment Company. Should you enter any part of any property, you may be subject to arrest for trespassing under that states [sic] trespassing law. Should your presence go undetected and you win in the casino; all winning [sic] will be forfeited including jackpots. **You must refrain from entering any Caesar's related property in any part of the United States."** Complaint, ¶ 15, JA p. 3 (Emphasis in original).

8. In Nevada, Caesars and Operating maintain an affiliation with many gaming licensees and hotels to which the letter referenced in the preceding paragraph appears to be intended to apply, including casinos commonly

referred to as: The Rio; Caesars Palace; Paris; Planet Hollywood; Bally's; Imperial Palace; Harrah's; Flamingo, and Harvey's. Complaint, ¶ 16, JA p. 3.

9. The casinos affiliated with Defendants in Nevada hold the character of public amusements. Complaint, ¶ 20, JA p. 4.

10. The hotels affiliated with Defendants in Nevada hold the character of innkeepers. Complaint, ¶ 25(c), JA p. 5, and see Tienda v. Holiday Casino, Inc., 109 Nev. 507, 853 P.2d 106 (1993).

11. Caesars and Operating exercise control over the casinos affiliated with them with respect to trespass warnings and enforcing trespass warnings. Complaint, ¶ 28, JA p. 6.

12. On September 23, 2011, Caesars confirmed in writing that it would seek to enforce the Nevada eviction of Plaintiff from Nevada casinos and hotels concerning its affiliated properties. Complaint, ¶ 29, JA p. 6.

In simple terms, Plaintiff is a well-respected professional. Without cause, Defendants excluded the Plaintiff from all casinos and hotels affiliated with Caesars Entertainment, inclusive of a number of such casinos in Nevada. Plaintiff, at the time of filing the complaint, intended to attend an event at one such casino, to wit: Paris Hotel and Casino, and the exclusion by Defendants prevented him from doing so.

## VII. ARGUMENT

### A. INTRODUCTION

Before the court are three issues of law which this court has not addressed in this century or the preceding century. Two of these arise under the common law, to wit: 1) Under the common law, does a casino as innkeeper hold a duty of allowing access to members of the public seeking to use the services and amenities offered by it; 2) As a casino operating a public amusement, does the common law of reasonable access applicable to businesses and amusements open to the public impose a duty to allow access upon the Defendants? The third issue requires a determination of whether, per statute, NRS 463.0129 imposes upon a gaming licensee a duty of allowing access to members of the public seeking to use the services and amenities offered by the casino? Absent overruling the common law, in light of the two letters to Plaintiff from Caesars affiliated properties, Defendants breached this duty and are barred by law from excluding or ejecting Plaintiff.

With these questions, another factor arises within the context of this case. Plaintiff does not contend that there exists an unfettered duty to allow access, and any and all questions concerning the ability of a casino to eject or refuse admission **for proper cause** are not before the Court on this appeal. Per the pleadings dismissed by the district court, this is not an issue concerning the ability

of a Nevada gaming licensee hotel to protect itself from disorderly, odious persons, or reasonably objectionable prospective guests.

### B. IN BARRING PLAINTIFF FROM ITS HOTELS, DEFENDANTS HAVE VIOLATED LONG-STANDING AND IMMUTABLE LEGAL PRINCIPLES APPLICABLE TO INNKEEPERS IN SOCIETY

In operating in Nevada as an innkeeper,[2] Defendants committed a tort in prospectively barring Plaintiff from its hotels. Nevada law addresses this issue on its founding and by statute. From the onset of the existence of Nevada, through today, the English Common law was accepted as the rule governing decisions in this state. See Hamilton v. Kneeland, 1 Nev. 40, 57 (1865);[3] NRS 1.030. This rule of application of the common law as the rule of decision in the courts

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[2] Nevada recognizes hotel/casinos as innkeepers. See Estate of Smith ex rel. Smith v. Mahoney's Silver Nugget, Inc., 265 P.3d 688 (Nev. 2011); Tienda v. Holiday Casino, Inc., 109 Nev. 507, 853 P.2d 106 (1993). This also appears correct under the classic common law definition of an innkeeper providing that an innkeeper is, "One who keeps an inn, hotel, motel or house for the lodging and entertainment of travelers." Black's Law Dictionary, 5th ed. (West 1979).

[3] Curiously, there has been some dispute in Nevada as to the date of the common law to be applied. The cited decision, Hamilton, seems to indicate that the proper date to look to is 1776, the date of the establishment of the Union. Subsequent Nevada authority, nonetheless, deems the common law as of the date of the establishment of the State of Nevada, 1864, as the proper time for determination of the common law to be applied in Nevada. Aftercare of Clark County v. Justice of Las Vegas Twp. ex rel. County of Clark, 120 Nev. 1, 4, 82 P.3d 931, 932 (2004). Here it does not matter because the common law was the same on each date, yet an opportunity for the clarification of which date establishes the common law referenced in NRS 1.030 appears in this matter.

continues today with all the strength and vitality of these founding principles. Accord Howard v. State, 128 Nev. ___, 291 P.3d 137, 140 (Nev. 2012). Thus, the first issue, whether a duty exists requiring a Nevada innkeeper to accept guests, appropriately looks to the common law of England as it existed in 1776 or 1864 for the definitive answer.

Since time immemorial, the common law has mandated public access to certain private businesses. At various times the businesses which could not deny access included such trades as public amusements, food sellers, blacksmiths, tailors, and veterinarians. See Individual and the Public Service Enterprise in the New Industrial State, 55 Cal. L. Rev. 1247, 1253 (1967). As of 1776, 1864, and today, there exists a core of businesses for which the law absolutely requires the right of access to patrons in all American jurisdictions. These are common carriers and **innkeepers**.

As to innkeepers, there is not even the semblance of a question, and the Defendants owe Plaintiff the right of access mandated by the common law. "Innkeepers . . . **by the laws of all the states** . . . are bound, to the extent of their facilities, to furnish proper accommodation to all unobjectionable persons who in good faith apply for them." Civil Rights Cases, 109 U.S. 3, 25, 3 S. Ct. 18, 31, 27 L. Ed. 835 (1883) (emphasis added); Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston, 515 U.S. 557, 571, 115 S. Ct. 2338, 2346, 132 L. Ed. 2d 487 (1995) ("[[T]]he innkeeper is not to select his guests[;] [h]e has no right to say

to one, you shall come into my inn, and to another you shall not, as every one coming and conducting himself in a proper manner has a right to be received; and for this purpose innkeepers are a sort of public servants." (citations omitted)); Toxaway Hotel Co. v. J.L. Smathers & Co., 216 U.S. 439, 447, 30 S. Ct. 263, 54 L. Ed. 558 (1910) ("An innkeeper cannot refuse his guest."); Thomas v. Pick Hotels Corp., 224 F.2d 664, 665 (10th Cir. 1955); Kellogg v. Commodore Hotel, 187 Misc. 319, 324, 64 N.Y.S.2d 131, 136 (Sup. Ct. 1946); Asseltyne v. Fay Hotel, 222 Minn. 91, 98, 23 N.W.2d 357, 362 (1946) (Also recognizing the rule as a national rule); Bennett v. Dutton, 10 N.H. 481, 486 (1839); Langdon v. Google, Inc., 474 F. Supp. 2d 622, 634 (D. Del. 2007); ("[A] person engaged in a public calling, such as an innkeeper . . . was held to have a duty to the general public to serve without discrimination all who sought service."); Kveragas v. Scottish Inns, Inc., 733 F.2d 409, 412 (6th Cir. 1984); 40A Am. Jur. 2d Hotels, Motels, Etc. § 60 (West, 1999, supp. 2000) ("[A]n innkeeper is under a duty to receive and entertain all persons who offer themselves as guests, unless he or she has some reasonable grounds for refusing to receive and entertain them."); Prosser, Law of Torts 4th Ed. at 339 ("[T]hose engaged in "public" callings, who, by holding themselves out to the public, were regarded as having undertaken a duty to give service, for the breach of which they were liable. This idea still survives in the obligation of . . . innkeepers . . . to serve all comers."); cf Billingsley v. Stockmen's Hotel, Inc., 111 Nev. 1033, 1038, 901 P.2d 141, 145 (1995) (Negative inference that proper

guests cannot be ejected or refused services to be drawn from holding that disruptive guests can be ejected); Lee v. GNLV Corp., 117 Nev. 291, 295, 22 P.3d 209, 212 (2001) (Recognizing that innkeeper status carries with it duties under the common law transcending duties owed by other businesses); Sims v. Gen. Tel. & Electronics, 107 Nev. 516, 526, 815 P.2d 151, 157 (1991) overruled on other grounds by Tucker v. Action Equip. & Scaffold Co., Inc., 113 Nev. 1349, 951 P.2d 1027 (1997) (same).

In the failure to fulfill this duty, the innkeeper is civilly liable to the putative guest. Jackson v. Virginia Hot Springs Co., 209 F. 979, 980 (W.D. Va. 1913) rev'd, on other grounds 213 F. 969 (4th Cir. 1914); Cornell v. Huber, 102 A.D. 293, 92 N.Y.S. 434 (1905); Kisten v. Hildebrand, 48 Ky. 72, 74 (1849); accord Mankodi v. Trump Marina Associates, LLC, No. 12-3067, 2013 WL 1867463, at *3-4 (3d Cir. May 6, 2013); Prosser, The Law of Torts, , supra. Indeed, refusing to entertain a guest is of such gravity that, under the common law, it is not only tortious to refuse to accept a guest, but actually an indictable crime committed by the innkeeper. Kisten, supra; State v. Moore, 12 N.H. 42, 45 (N.H. 1841); Rex vs. Ivens, 7 Car. & P. 213, 173 Eng. Rep. 94 (1835); Regina v. Sprague, 63 J.P. 233 (Surrey Qtr. Ses., Eng. 1899).

The district court relied upon the premise that a property owner could refuse service to anyone it desired. See Oral Argument at JA p. 103: 16-19. Ignored was the argument that as to Defendants, innkeepers, a different duty

appertained to them. See Plaintiff's Opposition to Defendants' Motion to Dismiss, pp. 8-9, 19-21, JA 45-48. Clearly, in light of the foregoing, absent a reasonable basis concerning the prospective guest, an innkeeper cannot deny accommodations.

Defendants have denied Plaintiff accommodations, and done so in the strongest terms—'If you enter our hotel, you will be arrested.' Complaint, ¶ 15, JA p. 3. This, undertaken without reason concerning the Plaintiff, violates the law, and provides Plaintiff with a civil cause of action.

Defendants' argument in the district court, in response to the allegation of an innkeeper tort was to claim it was not pled in the complaint and to assert that Nevada had never addressed the issue. Defendants' Reply in Support of Motion to Dismiss Complaint ("Defendants' Reply Brief"), pp. 11-12, JA pp. 92-93. The issue was raised in the Complaint at ¶ 25. c., conspicuously ignored by the Defendants in the district court. This allegation provides, "As an innkeeper operating an inn in conjunction with a casino, Defendants are bound by the common law obligations of an innkeeper to accept all suitable travelers, and the common law actually restricts the action [barring of the Plaintiff] (rather that allows the action) taken by the Defendants."[4] Contrary to the Defendants' perspective, the issue was squarely before the district court in the complaint.

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[4] Despite this direct reference in the Complaint to Defendants' status as an innkeeper and the duty to allow access, Defendants stated in their Reply Brief, p.

As a variation on this theme, Defendants also pretended that the Complaint solely addressed the prospective relationship between Plaintiff and Defendants as centered exclusively on Plaintiff being barred from access to gaming. Defendants' Reply Brief, generally. JA pp. 81-96. To the contrary, the Complaint centered on alleged violations stemming from the Defendants' status as an innkeeper and public calling, and largely ignored Plaintiff's exclusion from gaming. Complaint, generally, and ¶¶ 6, 36, 37, JA 2, 6-7. Resort to such tactics as pretending alleged facts do not exist clearly bespeaks an inability to address the factors under the law, and as noted above, under the law applicable in Nevada the Defendants could not bar Plaintiff from access to its inn.

As to Nevada allegedly having never addressed the issue, clearly, through the adoption of the common law, Nevada addressed the issue. See NRS 1.030. Indeed, as noted, the issue is so entrenched in the common law which Nevada adopts that the United States Supreme Court recognized that "the law of all states" adopt the concept of required access as a duty of an innkeeper. Civil Rights Cases, supra. Moreover, Defendants' actual argument is that because the Nevada Supreme Court had never opined on the issue, the duty cannot exist. Accord Defendants' Reply Brief, p. 11, JA 92: 6-10. This reasoning argues the pinnacle

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12, "Plaintiff's Opposition was the first indication that any innkeeper issues were being asserted by Plaintiff." Clearly, this was not the case.

of sophistry and stands contrary to reason, especially in the context of such an entrenched and universal rule.

Defendants assert that because Nevada has existed for just shy of a century and a half without an opinion means that the rule does not apply in Nevada. Id. A far more logical conclusion is that throughout the existence of the State of Nevada, no innkeeper would presume to violate this immutable and constant rule of law applicable to them, and thus, the courts were wholly avoided because the law was followed. Also supportive of this conclusion is that innkeepers are not as generally unreasonable as Defendants appear here, welcome appropriate guests to their premises, and avoid acts which create the present issue. Simply, Defendants, in their arrogance and feigned modernity, fail to recognize that as hoteliers they owe special duties to society and its members. Nonetheless, the universal common law, the law of Nevada, and reason all dictate that they do owe such duties.

More to the point, Defendants failed to cite a single case spanning five centuries of common law which refused to apply the universal rule that an innkeeper cannot exclude a guest who appropriately presents himself while rooms are available. The district court ignored the issue. Now, squarely presented, is a plea by an innkeeper to release innkeepers from these ancient and uniformly applied duties. Defendant cites no policy reasons for avoiding the dictate, while

the rationales commanding the duty pepper the authorities cited.[5] The wisdom of the common law rule is unchallenged. Defendants presented no meaningful argument in the court below for the district court to jettison this law ascribing a duty to accept patrons upon an innkeeper. The district court should be reversed, and the matter remanded for proceedings consistent with the valid claim made by Plaintiff concerning Defendants' breaches of duties owed to Plaintiff as innkeepers.

## C. PER THE COMMON LAW, DEFENDANTS, AS CASINOS, OWE A DUTY OF ACCESS TO THE PLAINTIFF

### 1. THE HISTORY AND STATUS OF THE COMMON LAW RIGHT OF ACCESS TO PUBLIC AMUSEMENTS

As noted above, the common law to be applied in Nevada is the common law as it existed as of 1864 or 1776. As of those dates, the common law not only provided for mandated access to innkeepers and the services of common carriers, but also provided a duty to allow access in public amusements. See e.g. Donnell v. State, 48 Miss. 661, 680-681, 1873 Miss. LEXIS 89, **30 (1873) (public

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[5] Substantive and broad-sweeping reasons for the retention of the rule providing a duty to allow access exist. These parrot the reasoning concerning "public amusements" in the following sections, and for brevity, the analysis will not be repeated here. Nonetheless, where a split of authority exists concerning public amusements, no split exists concerning innkeepers, the duty to grant access and services is universal, and the policy reasons discussed have already been repeatedly applied to innkeepers. These policy reasons include varied and compelling analysis concerning public callings, state licensing, voluntary acceptance of the duty, societal needs and expectations, etc.

amusement)[6], Ferguson v. Gies, 46 N.W. 718, 720 (Mich. 1890) (restaurant), Willis v. McMahan, 26 P. 649 (Cal. 1891) (place of resort), Grannan v. Westchester Racing Ass'n, 16 A.D. 8, 20 (N.Y. App. Div. 1897), (horse racing grounds) (reversed on other grounds in Grannan v. Westchester Racing Ass'n, 153 N.Y. 449, 462, 47 N.E. 896, 900 (1897), expressly noting that the reversal did not affect the appellate court's analysis of the duty of public amusements to allow access); cf. State v. Walker, 1850 WL 2919, 1 Ohio Dec. Reprint 353, 358 (Ohio Com. Pl. 1850) (Recognizing a circus—i.e., a public amusement--together with an inn and a railroad—as a place where cause must exist to eject); and see Bell v. Maryland, 378 U.S. 226, 299 (1964), (Goldberg concurring, joined by Marshall and Douglas); and People v. King, 18 N.E. 245, 247 (N.Y. 1888) (Recognizing the right of white people at common law to access public amusements, with the court extending the same right to "citizens of African descent"). In addressing the nation's first civil rights act, the Civil Rights Act of 1875, even the legislative history showed recognition of this common law rule mandating access to public

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[6] As noted in Donnell at 680-81, "Among those customs which we call the common law, . . . are rules which have a special application to those who sustain a quasi-public relation to the community. . . . [A]ll who applied for admission to the public shows and amusements, were entitled to admission, and in each instance, for a refusal, an action on the case lay, unless sufficient reason were shown."

amusements. Cong. Globe, 42d Cong., 2d Sess., 382-8.[7] Clearly, as of the pertinent times (1864 or 1776), the common law recognized the right of persons to access the services and amenities provided by a public amusement under the common law, and imposed a corollary duty upon the public amusement to allow access.

Admittedly, based on insidious reasoning, a majority of jurisdictions reversed and supplanted this historic rule with a new rule under which a public amusement can eject or deny access, allegedly for any or no reason. Other states have continued the common law rule. *See e.g.*, *In re Cox*, 474 P.2d 992 (Cal. 1970);[8] *State v. Tauvar*, 461 A.2d 1065 (Me. 1983); *Cummins v. St. Louis Amusement Co.*, 147 S.W.2d 190 (Mo. App. 1941). Other courts have re-

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[7] Sen. Charles Sumner, R. Mass., noted: "Theaters and other places of public amusement, licensed by law, are kindred to inns or public conveyances, though less noticed by jurisprudence. But, like their prototypes, they undertake to provide for the public under sanction of law. They are public institutions, regulated if not created by law, enjoying privileges, and in consideration thereof, **assuming duties not unlike those of the inn and the public conveyance**. From essential reason, the rule should be the same with all. As the inn cannot close its doors, or the public conveyance refuse a seat to any paying traveler, decent in condition, **so must it be with the theater and other places of public amusement.** Here are institutions whose peculiar object is the 'pursuit of happiness,' which has been placed among the equal rights of all." (Emphasis added).

[8] In Cox, the court was addressing a statute that affirmed access to all places of public service and accommodation including "places of amusement" for all persons presenting themselves in an orderly fashion, and expressly noted that this rule within the statute was a codification of the common law. Therefore, per Cox the common law necessarily provided such access as well.

recognized the illegitimacy of the departure from the historic common law, reversed the intervening authority granting the ability of a public amusement to arbitrarily exclude patrons, and returned their jurisprudence to the common law mandating a grant of access to public amusements as it existed prior to the 1870s in their states. *See Uston v. Resorts International Hotel, Inc.*, 445 A.2d 370 (N.J. 1982). Nevada has never backed away or overruled this common law status with respect to public amusements. As such, the common law in Nevada continues to apply, upon the owner thereof, a duty to allow access in places of public amusement to those properly presenting themselves.

Due to the policy considerations arising from the cause for the departure from the common law, the Court should eschew the current majority rule, and confirm the continued viability of the rule mandating access as of the time Nevada became a state. In this respect, under the rule stated in NRS 1.030, the historic common law, and not the majority departure, properly continues to govern in Nevada.

The two competing rules are: 1) A public amusement (and in some jurisdictions, any business open to the public) must grant access to all members of the public appropriately presenting themselves for the purpose of using the services offered by the business; or 2) All businesses open to the public, save for innkeepers, common carriers, and utilities hold the right to refuse service to any person for any or no reason. In addressing this matter, assuming that this Court

considers departure from the common law appertaining at the time of Nevada statehood, it is the responsibility of the court to adopt the rule of law between competing rules as the one best suited to the circumstances existing within the jurisdiction, and this is not premised on the majority/minority distinction. Kendall v. Ernest Pestana, 709 P.2d 837, 847 (Cal. 1985) ("We would be remiss in our duty if we declined to question a view held by the majority of jurisdictions simply because it is held by a majority."); Nocktonick v. Nocktonick, 611 P.2d 135, 136 (Kan. 1980); S. Carolina Ins. Co. v. Collins, 237 S.E.2d 358, 362 (S.C. 1977); accord Kelleher v. Marvin Lumber & Cedar Co., 891 A.2d 477, 490 (N.H. 2005).

Here, in contrast to the prevalent disputes between minority and majority rules of law, the rule of law allowing for exclusion (majority rule) is decidedly tainted, not based on logic or evaluation of circumstances, and is actually a rule adopted to forward and foster the despicable goal of invidious discrimination. That is, the entire concept of exclusion adopted as the majority rule presents an historic adoption of 'Jim Crow' perspectives by courts to perpetuate the badges of slavery. Beyond dispute, this adopts a now fully tainted rationale for the adoption of a law, but continues in most jurisdictions as an historic anomaly as it relates to access to public amusements. Thus, whether to adopt a rule steeped in historic racial prejudice à la the now thoroughly discredited philosophy of Plessy v. Ferguson, 163 U.S. 537, 16 S. Ct. 1138, 41 L. Ed. 256 (1896), faces this Court, or as an alternative, the Court may retain the common law tested by a half-

millennium of jurisprudence under which public amusements cannot refuse access to those properly presenting themselves.

This is evinced by the development of the law allowing exclusion. As noted and demonstrated by the above authorities, the historic rule commanded that one operating a public amusement must allow access to all patrons properly presenting themselves so long as the patron was white. Ferguson v. Gies, 46 N.W. 718, 720 (Mich. 1890) ("The common law as it existed . . . before the colored man became a citizen under our constitution and laws, gave to the white man a remedy against any unjust discrimination to the citizen in all public places."); accord The Civil Rights Cases (United States v. Stanley), 109 U.S. 3, 27 (1883) (Court assumed a civil right of access held by the public to public amusements in reaching its decision). Truly, the historic statement of the rule referencing "colored" and "white" and applying disparate treatment bespeaks the inadvisability of the departure from the common law championed by the Defendants.

The actions, in response to the Civil War Amendments, by various state legislatures concerning the right of access best exemplifies the despicable basis for its abandonment by a majority of jurisdictions. Some states attempted to absolutely restrict the reach of the Civil War Amendments by allowing public amusements to exclude persons of African descent, while other states sought to adopt their intent and extend rights of access to persons of African descent. For

example, in 1875, the Tennessee legislature passed an act providing in relevant part:

> "The rule of the **common law** giving a right of action to any person excluded from any . . . **place of amusement**, is hereby abrogated; and hereafter no keeper . . . shall be bound or under any obligation to entertain . . . or admit any person whom he shall for any reason whatever choose not to entertain . . . to his . . . place of amusement . . . ."

Act of Mar. 24, 1875, ch. 130, 1, 1875 Tenn. Pub. Acts 216-17. (Emphasis added). Through this act, the Tennessee legislature expressly recognized the common law duty of a "public amusement" to provide access, and in a blatant application of 'Jim Crow' legislation, revoked this long-standing common law right.

Other states and the United States attempted to affirmatively extend such rights to African Americans, rather than restrict them. For example, the United States and the states of Louisiana and Mississippi codified the common law right of access to public amusements by white persons such that it extended to persons of African descent. See, People v. King, 110 N.Y. 418, 423, 18 N.E. 245, 246 (1888). The state of New York criminalized the discrimination of violating these public access to public amusements rights. Id, and see N.Y. Penal Code, § 383 (N.Y. Stat., 1883). Massachusetts did likewise. Mass. St. of 1865, c. 277. Clearly, at the close of the Civil War, it was well recognized and established under

the common law, at least so far as the law concerned white citizens, that public amusements held a duty to allow access to members of the public.

In actuality, the act of the Tennessee legislature referenced above, despite coming a decade following the close of the Civil War, may be viewed as the first 'Jim Crow' legislation in the nation. Sources cite the first inklings of 'Jim Crow' not arising until 1875, the date of this act. In the late 1870's some further whittling away of racial equality compelled by the Civil War Amendments started to appear.[9] Still, as late as 1890, African Americans in the South voted, rode on unsegregated trains, had a right of access to public amusements, and shared public facilities. As discussed in the seminal work on the subject, the foregoing gave way to a deluge of 'Jim Crow' legislation and court rulings fostering attitudes arising at the close of the progressive era, 1900 through 1910. C. Vann Woodward The Strange Career of Jim Crow, (Oxford University Press, 1957).

It was during this period of the rise of the segregationist movements that the rejection of the right of equal access to, and duty to provide access to, public amusements gained traction and blossomed into the majority rule. Simply, by defining away the right of access, and corollary duty to provide access, concerning public amusements, the courts fostered and validated the ability of private

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[9] Compare Louisiana Const., Art. 135 (1868) (Constitutional prohibition on segregation of the races in public accommodations), with Louisiana Const., Art. 231 (1879) (Dropping the provisions prohibiting segregation in public accommodations from Louisiana's constitution).

amusements to eject on the basis of race. Uston v. Resorts International Hotel, Inc., 445 A.2d 370, 376 (N.J. 1982); Bell v. State of Maryland, 378 U.S. 226, 299 (1964) (Goldberg concurring, with whom Chief Justice Warren and Justice Douglas joined); and see e.g. Plessy v. Ferguson, 163 U.S. 537, 16 S. Ct. 1138, 41 L. Ed. 256 (1896); Taylor v. Cohn, 84 P. 388 (Or. 1906).

In light of the foregoing, two things appear certain. First, at the time of Nevada's admission to the union, and at the time of the founding of the United States, the common law provided for a right of access and a corollary duty to grant access to businesses operating amusements open to the public. Second, as a result of the rise of 'Jim Crow' perspectives, and in order to foster invidious discrimination, a majority of courts and legislatures sought to restrict and eradicate this duty to provide access to public amusements.[10] As shown above, they did this through either outright legislating the common law of access out of existence, or turning to the courts where the courts pretended it never existed. In

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[10] The question might be raised as to why this occurred with public amusements but not with the other businesses such as innkeepers and common carriers where access was granted. The question bespeaks its own answer. The common carrier and the innkeeper were able to provide a separate rail car, or set of rooms, through the tawdry practice of 'separate but equal' sanctioned in the infamous case of Plessy v. Ferguson, 163 U.S. 537, 16 S. Ct. 1138, 41 L. Ed. 256 (1896). There existed no analogous manner in which to provide separate but equal access to unique and singular public amusements. Thus, to protect the 'Jim Crow' movement which was de regeuer at the time, declaring away the existence of such a right of access presented the only choice for the legislatures and the courts. Some went so far as to outright pretend that the right never existed despite the plethora of authority cited to the contrary.

contrast to the majority of jurisdictions, Nevada never turned down this seedy avenue, although that is what the Defendants request here through the encouragement of the adoption of this "majority" rule.

This puts Nevada in the following position: 1) It can declare that the common law continues as it existed on Nevada's entry into the Union, and public amusements are infused with a duty to provide access as mandated by NRS 1.030 and the wisdom of centuries of common law; or 2) It can pretend, like many other states have now done, that the common law never addressed public amusements despite the foregoing authority, or that the common law has changed, and adopt either common law theory mandating or denying a duty to provide public access to public amusements. If the latter course is chosen, the court should still avoid the insidious practice of other jurisdictions, and find a duty of public access for those offering their amusements to the public. As the following section addresses, by far, policy considerations balance towards full recognition of the right of access, and corollary duty to provide access, concerning patrons' relations with public amusements.

## 2. POLICY CONSIDERATIONS COMMAND THAT CASINOS IN NEVADA REMAIN OPEN TO MEMBERS OF THE PUBLIC

This case involves the ability of a member of the public to access publicly available and open businesses as a customer of the very services offered by the business under the common law. Policy concerns compel the retention of the

common law mandating access to places of public amusement in Nevada. The first step in addressing the ability of a casino or a hotel in conjunction with a casino to bar access is to examine the nature of the business. The duty of innkeepers and common carriers to provide services to all properly requesting them is beyond dispute. The bases for the duty to provide service concerning these historic common law rules have various origins and rationales. When these rationales are considered, a casino in Nevada meets or exceeds each rationale, and therefore, would also be a public calling subjecting the owner to a duty to allow access to those seeking its services.

The rationales provided for the imposition of this duty include the quasi-public nature of the business in relation to the community and commerce. That is, it is actually the general public that conveys the value to the industry, and this being the case, access cannot be denied arbitrarily. See Bowlin v. Lyon, 25 N.W. 766, 767 (1885). Indeed, Bowlin is especially instructive in this respect.

In Bowlin, the plaintiff was arbitrarily denied access to a skating rink on the basis of his race. The court noted a distinction between public amusements on the one hand, and innkeepers and common carriers on the other hand, and in this case, in the midst of 'Jim Crow', allowed the public amusement to exclude the plaintiff. Nevertheless, in doing so, the court pointed out that it was allowing the skating rink to exclude the plaintiff because a skating rink was not a regulated industry. Most importantly, it noted that if the skating rink were otherwise prohibited from

existing, and only existed through state authority, the skating rink "would be subject to the same restrictions" imposed on innkeepers and common carriers requiring that it remain accessible to members of the public. Id, at 767. As expressly noted, in such a case, the business "carries on the business under an authority conferred by the public, the presumption is that the intention was that whatever of advantage or benefit should result to the public under it should be enjoyed by all its members alike." Id, at 768.

The logic and basis for this result is compelling. Bowlin discusses the exact position which the Defendants occupy while noting that a duty to provide access would exist. Gambling was historically illegal, and remains a public nuisance in Nevada under the common law. Sea Air Support, Inc. v. Herrmann, 96 Nev. 574, 575, 613 P.2d 413, 414 (1980). Only conflicting statutory or conflicting constitutional provisions provide an exception to this rule. Id. In short, casinos exist only at the sufferance of the Nevada legislature. Being created by the embodiment of the public—the legislature—it strains credulity to conclude that this special grant carries with it an ability to arbitrarily deny the public access. Simply, there can be no business more thoroughly labeled as a public calling than a business which, absent special dispensation from the public, could not and would not even exist. The nature and basis upon which Nevada authorized casinos to operate certainly implies that they cannot entertain or refuse to entertain without proper cause.

Another rationale for the requirement that innkeepers and common carriers (and even food sellers, blacksmiths, tailors, and veterinarians) open their business to all comers turns on the acceptance of public service by the industry and the purveyors within that industry. As stated in one commentary:

> In short, certain institutions and enterprises are viewed by the courts as quasi-public in nature: The important products or services which these enterprises provide, their express or implied representations to the public concerning their products or services, their superior bargaining power, legislative recognition of their public aspect, or a combination of these factors, lead courts to impose on these enterprises obligations to the public and the individuals with whom they deal, reflecting the role which they have assumed, apart from and in some cases despite the existence of a contract.

Mathew O. Tobriner and Joseph R. Grodin, Individual and the Public Service Enterprise in the New Industrial State, 55 Cal. L. Rev. 1247, 1253 (1967). As noted in the article, the more or fewer of these attributes the enterprise has, the more appropriate it is for the common law to compel that its services remain open to the public. That is, it is the degree to which the enterprise is "vested with the public interest" that determines whether or not the common law should and will impose a duty to provide access. See also In re Cox, 3 Cal. 3d 205, 212, 474 P.2d 992 (1970).

Considering the factors that determine whether a given enterprise is a public calling under the common law, and correlatively whether they must provide their services to all patrons appropriately presenting themselves, the casino industry

meets and exceeds the considerations. Most importantly, as noted above, the very enabling statute under which casinos exist establishes functionally all of the factors to find a public calling or being vested with the public interest. Indeed, in Nevada, this "vested with the public interest" is express by statute. NRS 463.0129.1(a) ("The gaming industry is vitally important to the economy of the State and the general welfare of the inhabitants.").

As noted in the exhibits at JA pp. 11-12, 61-72, these enterprises have also taken upon themselves, voluntarily, the attributes of publicly available education, social intercourse, amenities for travelers, etc. Truly, they have made themselves virtually indispensable for conventions nationally and functionally all local entertainment and social events. As shown at JA 72, the Defendants' action in this case purports to bar this innocent Plaintiff from more than forty-five entertainment venues, and over twenty-five eateries of substance within Las Vegas, while at JA 61-72, this medical doctor is denied attendance at important conventions, seminars, and symposiums critical to the abilities of health care professionals to give aid to the sick and injured. As the exclusion of the Plaintiff originated in Mississippi, clearly the Plaintiff has not acted inappropriately at any of these forty-five venues, and the complaint, at this stage, establishes that he has not acted inappropriately at any venues. This has an impact upon the Plaintiff's ability to visit and enjoy Las Vegas, and the ability to arbitrarily exclude persons (especially considering the demonstration within this case that the Defendants will

attempt to enlist this exclusion) carries with it a likelihood of destroying the visits of other travelers from across the nation. With the Defendants existing because of the benefits it can bring the State through tourism, the corollary injury to this industry is clearly antithetical to the nature of the Defendants and their statutory purpose for existence. It is no stretch of the law to conclude that the common law also mandates that these entities treat tourists legitimately and welcome their attendance at their facilities, especially because casinos hold their very special license solely through the beneficence of the people of the State and exist for the certain purpose of encouraging tourism.

Other factors to be weighed in determining whether someone is engaged in a public calling or other circumstances requiring access, include the implied promise that in hanging out the sign inviting the public, there exists an implied assumpsit that the business live within its word and not arbitrarily exclude. James B. Ames, The History of Assumpsit, 2 Harv. L. Rev. 1 (1888) (explaining the special duties of common callings as based on the doctrine of assumpsit or the idea that the business had voluntarily "assumed" such obligations). Like above, the factors examined are the degree with which the state undertakes regulation and control of the industry, the importance of the public's ability to access the services, and the importance to the state of the public's ability to access the services. In this case all these factors balance solidly in the direction of

mandating access, absent proper cause, of members of the public to the services offered by a casino under the common law.

The fact that casinos are a restricted trade operating under a privilege license at variance with the common law has also supported such a conclusion among legal scholars. Commentators note that the origination of the public access under the common law, generally and with respect to special classes of businesses as well, has its origin in the special license granted by the crown (or in this case, the State). It would simply be antithetical to reason and justice that the state grant this special privilege and then allow the franchisee granted this oligopolic authority to provide its special services or goods to limited persons rather than requiring that "all who apply shall be served . . . without discrimination." See and accord, Bruce Wyman The Law of Public Callings as a Solution of the Trust Problem, , 17 Harv.L.Rev. 156, 166, (1904), and "The Origin and First Test of Public Callings," 75 U.Pa.L.Rev. 411, 423 (1927). Policy and reason dictate that the State not be a party to arbitrary discrimination against any citizen, and in granting this special privilege to gaming licensees, that the licensee live by the same policy and reason.

Historically, public callings include common carriers, innkeepers, blacksmiths, ferrymen, warfingers, victualers, bakers, and millers. As noted above, this list would have originally included (and should still include in Nevada and the other states previously referenced) purveyors of public amusements.

Obviously, over time, some of these professions have lost their character because their services are no longer integral to the community and its wellbeing. For example, a blacksmith is a trade that is likely no longer critical to a community. Others have been subsumed into the other classifications such as the ferryman and warfinger falling under the common carrier rule. The one truth, nonetheless, that remains constant throughout under the common law is that if a person or entity holds itself out as offering services to the public that are critical to the community's well-being, then that person or entity will be required by this common law to accept all patrons presenting themselves appropriately. With this said, there is no business in Southern Nevada, or even the entire State of Nevada, that is more critical to this community's wellbeing than casinos. Defendants are truly engaged in a pubic calling, and indeed, likely the only calling that allows the community to even exist. They are vested with this status, and by holding this status, are subject to a duty to allow access to its amenities to all who appropriately present themselves.

The special nature of casinos within the state is also evident through the conventions offered and the duty to provide public access casinos have necessarily accepted. For examples, the Court can take judicial notice that the 2012 Nevada Republican Convention was held at the Nugget Casino in Sparks, the corollary Democratic Party Convention was held in Bally's in Las Vegas, and so was AFSCME's 35th Annual Convention in 2002. The federal government held its

infamous GSA Convention for 2010 at the M Resort in Clark County. Casinos have taken on an encompassing role as the public gathering spot for organized conventions, which, as noted in the Complaint, Plaintiff was excluded from due to the Defendants' actions. Obviously, granting casinos the ability to set the guest list for government conventions and necessary state politics creates problems beyond any mere private property concern, and once voluntarily assumed, the implied promise of access should not be denied. Defendants regularly assume such functions. JA 61-68. With this, as the accepted gathering space for political, commercial, and government discourse, the ability to arbitrarily exercise a right to exclude attendees is at odds with the very nature of the casino industry, the needs and expectations of the State, and the needs and expectations of its citizens. Nevada should recognize casino and convention facilities as the public callings which they are, and for which the continuation of such character is vital to the commonweal of the State.

For the foregoing reasons, casinos in Nevada are clearly vested with a public purpose and exist only for the public interest (and even at variance with the general laws), the common law would not allow them to discriminate indiscriminately, and the other bases for requiring access under the common law exist. Simply, proper application of the common law, even if the law changed since Nevada's acceptance into the Union, would today mandate a duty held by the Defendants analogous to that of a common carrier or innkeeper, and the

Defendants are subject to a duty to allow Plaintiff access so long as he is not disorderly, disruptive, or otherwise injurious to Defendants' interests.

### 3. DEFENDANTS' ARGUMENTS AGAINST THE ACCEPTANCE OF THE DUTY RING HOLLOW AND DO NOT TOUCH UPON THE DUTY ASSERTED HERE

Through citation to cases involving an alleged constitutional right to access, this Court has held that there is no constitutional right to access in two cases where persons were excluded from property, to wit: S.O.C., Inc. v. Mirage Casino-Hotel, 117 Nev. 403, 405, 23 P.3d 243 (2001),[11] and Spilotro v. State, ex rel. Nevada Gaming Comm'n, 99 Nev. 187, 661 P.2d 467 (1983). Defendants relied on these cases in the District Court. Neither case provides any guidance in the current matter because, 1) There is no constitutional right or issue raised in the current matter, and more importantly, 2) In each case a legitimate reason for the exclusion was discussed and found.

In S.O.C., the court addressed the alleged right of handbillers to access the sidewalks in front of the Mirage Hotel & Casino. The handbillers argued a constitutional right to pursue the activity based on freedom of speech under the

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[11] The S.O.C. decision was issued on May 17, 2001, and held that a sidewalk easement granted by a casino did not create a public forum character to the sidewalk recognized by the constitution. On July 12, 2001, a decision was issued in Venetian Casino Resort, L.L.C. v. Local Joint Executive Bd. of Las Vegas, 257 F.3d 937 (9th Cir. 2001), which addressed the identical issue, and determined that the sidewalk easement did grant constitutionally recognized public easement character to the sidewalk. This, being a federal case addressing federal perspectives, it effectively overruled S.O.C.

First Amendment of the United States Constitution. This Court disagreed and allowed an injunction against the handbilling to stand. This does not touch upon the case at hand because, even under the common law argued by the Plaintiff, such exclusion would have been appropriate. Pointedly, even with the common law recognized right of access, that right is limited to access to the services provided by the publicly open business and subject to its reasonable rules and regulations.

This can be seen in the ancient, yet functionally on-point, common law cases of Commonwealth v. Power, 48 Mass. 596, 603 (1844) and State v. Steele, 106 N.C. 766, 11 S.E. 478 (1890).[12] In each the court recognized the common law rule of a right to access, but the courts noted that the right extended only to those seeking access of the services publicly provided by the business. In contrast, the S.O.C. plaintiffs were acting at variance with the Mirage's reasonable regulations, and exclusion was proper. The question here is whether the exclusion is proper for a person who has never violated a reasonable regulation, intends to comply with all regulations, and is of proper demeanor and character can be

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[12]"The [hotelier] is under no obligation to admit, but he has the power to prohibit the entrance of, any person or class of persons into his house for the purpose of plying his guests with solicitations for patronage in their business; and especially is this true when the very nature of the business is such that human experience would lead us to expect the competing "drummers," in the heat of excitement, not only to trouble the guests by earnest and continued approaches, but by their noise, or even strife." State v. Steele, 106 N.C. 766, 11 S.E. 478 (1890)

excluded from a casino. Obviously, this is a question untouched by S.O.C., and the case provides no authority for a departure from the common law.

Concerning Spilotro v. State, ex rel. Nevada Gaming Comm'n, 99 Nev. 187, 661 P.2d 467 (1983), it is even further removed from the present case than the S.O.C. decision. In Spilotro, a reputed gangster was placed on Nevada's list of excluded persons authorized by NRS 463.151. No casino excluded Mr. Spilatro—the State, through the Nevada Gaming Commission, mandated the exclusion. The Gaming Control Board based the exclusion on Mr. Spilatro being a person of ill repute. Like the activities in S.O.C., this is a legitimate basis to exclude even under the common law. See Nelson v. Boldt, 180 F. 779, 782 (C.C.E.D. Pa. 1910) (Holding that a charge to the jury that bad reputation can support exclusion despite the duty to grant access is proper); Raider v. Dixie Inn, 248 S.W. 229 (1923) ("It appears, therefore, fully settled that an innkeeper may lawfully refuse to entertain objectionable characters, if to do so is calculated to injure his business or to place himself, business, or guests in a hazardous, uncomfortable, or dangerous situation. With legitimate bases to exclude in both S.O.C. and Spilatro, these cases are divorced and remote from the question posed in this case, that being: Under the common law, does a place of amusement have a right to exclude absent a reason?

Indeed, this also explains why the plaintiffs in S.O.C. and Spilatro did not claim a common law right of access. Pointedly, under the authority supporting

public access, neither met the terms allowing for the assertion of the right. There is no precedence or guidance in either case.

### D. THE LEGISLATURE, UNDER NRS 463.0129.1(e), HAS CODIFIED DEFENDANTS' DUTY TO PROVIDE ACCESS TO ITS CASINO BY PLAINTIFF

Pursuant to NRS 463.0129.1(e), "all gaming establishments in this state must remain open to the general public and the access of the general public to gaming activities must not be restricted in any manner except as provided by the Legislature." Plaintiff, as a physician, gambler (incidentally not even an advantage gambler[13] as that term is used in the industry), tourist, and respected member of his community presents the embodiment of a member of the general public. He is a doctor and a traveler who frequents Nevada for, among other pursuits, attendance at professional gatherings. He also partakes of the entertainment offered by casinos, and is the most desirable guest that could be imagined in this State. That is, he is a high end gambler who loses money at the games, obviously gambles for entertainment and can afford to do so without injuring his family life or status, and in no trivial way, together with others of his type, provide the lifeblood of the community. He presents the quintessential person addressed by NRS 463.0129.1(e), and is entitled to its protections.

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[13] One who legally limits their play in casinos to games with a mathematical advantage against the casino. See Tsao v. Desert Palace, Inc., 698 F.3d 1128, 1131 (9th Cir. 2012)

Admittedly, there is a very confusing qualifier at the end of NRS 463.0129, but it can be parsed and defined through simple English, laws of statutory construction, and logic. When this is accomplished, it can only be concluded that NRS 463.0129.1(e), absolutely requires that the Defendants not deny Plaintiff access to their premises provided the pleadings are true, and he was excluded without a valid reasonable basis.

This qualifier provides, in relevant total:

> This section does not:
>
> > (a) Abrogate or abridge any common - law right of a gaming establishment to exclude any person from gaming activities or eject any person from the premises of the establishment for any reason; . . .

NRS 463.0129.3(a). Thus, the question before the Court is how, and if, this provision can be reconciled with the positive directive that access to the casino "must not be restricted in any manner." It can be reconciled, and Plaintiff is entitled to access.

First, of note, the provision speaks of "any" common law right, and not "the" common law right. Thus, before a person can be ejected for any reason, a common law right to eject must be found stating that reason. That is, the provision does not define the common law right as a right "to eject for any reason." Rather, it leaves those reasons to the common law, and the reason sought

must be found within the extant common law. Were it otherwise, the words "common – law right" would necessarily be absent from the statute. That is, Defendants attempt, and the district court accepted, that the "for any reason" language as 'for any reason whatsoever including unreasonable reasons,' while the statute clearly and unequivocally applies solely to 'any reason recognized under the common law.'

With NRS 463.0129.3(a), existing as the sole possible qualifier which could vitiate Defendants' obligation to provide the Plaintiff access stated in NRS 463.0129.1(e), absent a common law basis to grant the exclusion, access cannot be denied, and Defendants' duty to Plaintiff has been breached. In addressing the language of this qualifier, the language within NRS 463.0129.3(a) is itself qualified, and by its express terms, only refers to "any common-law right" to exclude or eject. Everything which follows this statement in NRS 463.0129.3(a) is absolutely restricted by this subject limiting the inquiry to the common law, and only common law bases to exclude survive the qualifier. That is, all that can be applied must exist within the common law; else it is outside of the application of NRS 463.0129.3(a), and NRS 463.0129.1(e) governs. Clearly, the import of this language is that all common-law rights to exclude or eject continue, and absent such a right to exclude or eject being found under the common law, NRS 463.0129.1(e) is absolutely effective and must be applied to mandate the allowance of access.

There is no common law right to eject or exclude a non-disruptive guest who is complying with the rules of the house. Even clearer, per the Defendants' innkeeper's duties, no common law right to exclude or refuse entertainment to a prospective hotel guest properly presenting himself exists. As noted in the preceding arguments, the common law actually mandates that such persons be granted access, and a corollary duty to allow access applies to the casino. There are common law rights to exclude, and as noted, these common law rights turn on the ejection of odious, disruptive, or disreputable persons. These are clearly the common law rights to which the statute applies, they do not reach the Plaintiff, and Plaintiff falls under the strictures of NRS 463.0129.1(e), whereunder the casino cannot deny him access.

Under principle rules of statutory construction, this is also the only conclusion to be drawn from the statute. Defendants attempted to argue that the language found in NRS 463.0129.3(a), stating "any reason" provides affirmative permission that an ejection does not require a legitimate reason, and the casino has unfettered authority to deny access to anyone. The "any reason" language is not a positive grant of such authority, but rather, appears under the umbrella of the limit of "common law right[s]" extant with respect to a casino.

Further, Defendants' analysis is in obvious error for a number of reasons. First, to read the statute as the Defendants proffer, the legislature must be given the authority to define "the common law." Defendants' construction, simply,

requires that the court accept a legislative directive that the common law includes a right to eject "for any reason." This the legislature cannot do. The common law is law "distinguished from law created by the enactment of legislatures . . . ." "The common law is generally described as those principles, usage and rules of action applicable to the government and security of persons and property **which do not rest for their authority upon any express and positive declaration of the will of the legislature**." Black's Law Dictionary, 5th ed. (West 1979), separately and citing to Bishop v. United States, 334 F. Supp. 415, 418 (S.D. Tex. 1971) rev'd on other grounds, 476 F.2d 977 (5th Cir. 1973) (Emphasis added). Simply, the legislature may supplement the common law, it may overturn the common law, and it may codify the extant common law, but the one thing it cannot do is create the common law. For Defendants' argument to be valid, this very foundational premise of the common law must be found to be invalid. Obviously, it is not.

"[I]t is an accepted principle of statutory construction that a legislature is presumed to know the common law before a statute is enacted . . . ." Makin v. Mack, 336 A.2d 230, 234 (Del. Ch. 1975); Twin Lakes Canal Co. v. Choules, 254 P.3d 1210, 1215 (Idaho 2011), reh'g denied (July 22, 2011); Reeves & Co. v. Russell, 148 N.W. 654, 656 (N.D. 1914) (Also noting that a statute which purports to be a declaration of the common law should be construed in accordance with the common law); Hamed v. Wayne County, 490 Mich. 1, 22, 803 N.W.2d 237, 251

(2011) cert. denied, 132 S. Ct. 1014 (U.S. 2012). Because of this presumed knowledge, the "any reason" language, being qualified by the introductory language referencing "common law" as the scope of the qualification to the duty to provide access in the defining language of NRS 463.0129.3(a), is clearly intended to mean 'any reason under the common law,' and not 'any reason the casino desires to assert.' Simply, the reasons a casino can eject or refuse admission is expressly limited to those reasons that the common law recognized, no more, and no less.

A second rule of statutory construction provides that the common law is not repealed or abrogated unless that is the specific intent of a legislative dictate. Indeed, a statute which purports to adopt or codify the common law, as does NRS 463.0129.3(a), does not repeal, modify or change the common law, but rather, affirms the common law extant at the time of passage, and "[leaves] it more firmly in force." Woodstock v. Whitaker, 62 Nev. 224, 229, 146 P.2d 779, 781 (1944), and see Hamed v. Wayne County, supra. Indeed, the court in Woodstock v. Whitaker was clearly faced with an argument analogous to the Defendants' arguments concerning NRS 463.0129.3(a) made in the district court, and the Woodstock court found that in purporting to codify the common law, a legislature does not change the common law in its enactment or in its repeal. As there was no ability to exclude the Plaintiff under the common law, and an absolute duty to grant access to Plaintiff under the common law, the dictate to grant access found

in NRS 463.0129.1(e), presents an extension of the law through the very recognition and dictate that access cannot be denied. That is, NRS 463.0129.1(e) is a codification of the common law, validates the prior sections of this brief, and Defendants breached the statute's dictate in prospectively barring the Plaintiff.

Perhaps the most compelling rule of statutory construction affirming a reconciliation and analysis of NRS 463.0129.1(e) and NRS 463.0129.3(a) as herein provided is the rule that language within a statute be given effect. As stated in State ex rel. City of Las Vegas v. Clark County, 58 Nev. 469, 83 P.2d 1050, 1054 (1938), "Every word and clause in an act **must be given effect if possible** and none rendered meaningless by over–nice construction." (Emphasis added). Uses of the "must" and "possible" indicate that this rule is of the strongest nature. Simply, "basic rule of statutory interpretation that holds that statutes must . . . not be read in a way that would render words or phrases superfluous or make a provision nugatory. Blackburn v. State, 294 P.3d 422, 426 (Nev. 2013).

Defendants' position violates this rule of construction in an extreme manner. The legislature affirmatively dictated in NRS 463.0129.1(e), that "the access of the general public to gaming activities **must not** be restricted **in any manner**" by gaming licensees. (Emphasis added). Should Defendants' argument and construction of NRS 463.0129.3(a), be accepted, then this language is rendered entirely nugatory. Simply, defendant contends that it can have someone stand at a door and pick and choose who can enter as arbitrarily as it wishes. This

ability swallows and vitiates the statutory mandate found in NRS 463.0129.1(e), commanding access.

There remains an easy reconciliation to the mandate that all language in an act be given effect if possible. As noted above, the continuation of common law non-arbitrary bases for ejection or exclusion was clearly what the legislature intended in the passage of NRS 463.0129.1(e), appropriately protecting the casino industry from a duty to allow access to the disruptive, disreputable, and odious which the common law allows for. And in the absence of such a character to the patron, "access must not be restricted in any manner." NRS 463.0129.1(e). That is the law and the right the Plaintiff has been denied and seeks to protect through the current litigation. The district court erred in dismissing this litigation.

## E. OTHER CONCERNS

The district court seemed preoccupied with a concern that there was something more than a mere arbitrary exclusion. See Oral Argument, JA 107-108. The Complaint alleges the converse. Plaintiff's counsel even cited that nothing had occurred which would give rise to challenging Plaintiff's propriety as a guest. Complaint, ¶ 14, JA p. 3. To the extent that the district court extrapolated facts providing a basis to exclude Plaintiff, here it did so at direct variance with the pleadings. If the district court did so, it erred in such extrapolation. Buzz Stew, LLC v. City of N. Las Vegas, 124 Nev. 224, 227-28, 181 P.3d 670, 672 (2008).

Defendants also spewed out a parade of horribles should Plaintiff's position be adopted. This is ridiculous. First, Nevada has existed for a century-and-a-half with this apparent common law mandating access, and the State has thrived on the industry, not tumbled as the Defendants suggest. Then there is the fact that over twenty years ago the State of New Jersey found the common law and the right of access to exist. *Uston v. Resorts International Hotel, Inc.*, 445 A.2d 370 (N.J. 1982).[14] The states applying the common law of a right to access and the states applying the common law of the innkeeper's duty to entertain guests applicable in all jurisdictions appeared apparently suffer no ill effects as a result of this rule. In the meantime, the right of access fulfills the needs of the members of society in accessing valuable services or goods, while granting the proprietor a reasonable ability to control their property through exclusion of those objectively objectionable.

Next, the Defendants argued that with restraint on the ability to exclude casinos would have to suffer the presence of the most outrageous persons in their establishment. Oral Argument at JA p. 101. To the contrary, as noted above,

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[14] Defendants suggested in the court below that the courts had suggested that the holding in Uston mandating access was dicta. While, proximate to the decision, one court did so indicate, the courts of New Jersey now clearly affirm that the holding mandating access is not dicta, and is the law of the land in that state. See Citing to *Uston* New Jersey has reconfirmed the right of access under the common law rendering the holding anything but dicta. See e.g. Green Party v. Hartz Mt. Indus., 752 A.2d 315, 331 (N.J. 2000), Campione v. Adamar, Inc., 714 A.2d 299, 305 (N.J. 1998), State v. Morse, 647 A.2d 495, 496 (Law Div. N.J. 1994).

under the common law only those properly presenting themselves in the character of the facility must be granted access. Thus, even under Defendants' arguments, the very people they claim must be granted access under the mandate of access can be excluded under the common law. See Nelson v. Boldt, 180 F. 779, 782 (C.C.E.D. Pa. 1910) and Raider v. Dixie Inn, 248 S.W. 229 (1923), discussed supra.

As to a parade of horribles, the absence of the rule proffered by the Plaintiff can have such a result. For example, assume that, as in the last Republican State Convention held at the Sparks Nugget casino, a powerful casino owner held certain views on the issues that split that convention. Per Defendants' argument, that casino owner could give orders to exclude certain delegates of a given persuasion by name from the property as they arrived on the morning of the convention. In short, Defendants' rule grants power to the casinos to control the orderly administration of the democratic process within the State. Such an anomaly cannot withstand the scrutiny of any reasonable application of the common law.

There is also the issue of the rapacious damage arising from the arbitrary exercise of an unfettered right of exclusion. As noted, Nevada recognizes and fosters the casino industry as a critical factor for the economic well-being of the State. Undoubtedly, the arbitrary exercise of the alleged right to exclude as pled in the Complaint provides no benefit to the State, and holds great potential for

causing wide-ranging damage to the economy and the vital casino industry. This is even recognized in the Gaming Regulations at NV GAM REG 5.011, where it is provided that "Failure to exercise discretion and sound judgment to prevent incidents which might reflect on the repute of the State of Nevada and act as a detriment to the development of the industry," and correlatively, an "unsuitable method of operation." Obviously, such treatment to one individual has a geometric effect causing many others to eschew Nevada for friendlier and more reasonable locales. Each time this alleged right is exercised, more and more tourists will choose New Jersey or another venue over Nevada. It is the Defendants' position which is antithetical to reason, good business practices and reason. The Court should assure that such practices not gain the sanction of law, reconfirm the duty of innkeeper's to accept guests, recognize the common law providing a duty to provide access to public amusements, and give teeth to the statutory dictate that "access to gaming . . . not be restricted."

## X. CONCLUSION

For the reasons set forth above, Plaintiff requests that the dismissal of Plaintiff's claims for failure to state a claim upon which relief can be granted be

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reversed, and the case be remanded for proceedings consistent with such ruling.

Dated this 3d day of July, 2013

**Nersesian & Sankiewicz**

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## XI. CERTIFICATE OF COMPLIANCE

1. I herby 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 requirement of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced type face using Word 2010 in fourteen point Times New Roman.
2. I further certify that this brief complies with the type-volume limitations of NRAP 32(a)(7)(A)(ii) because, excluding the parts of the brief exempted by NRAP(a)(7)(C) it is proportionately spaced, has a typeface of 14 points or more and contains 12,099 words.
3. Finally, I hereby certify that I have read this appellate 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 3d day of July, 2013

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## XI. PROOF OF SERVICE

On July 3, 2013, the undersigned did serve APPELLANT'S OPENING BRIEF ON APPEAL upon following counsel:

James E. Whitmire
Jason D. Smith
Santoro Whitmire

through the electronic filing system maintained by this court.

*/S/ Robert A. Nersesian*
An employee of Nersesian & Sankiewicz

## XII. ADDENDUM

Nev. Rev. Stat § 1.030. **Application of common law in courts**

The common law of England, so far as it is not repugnant to or in conflict with the Constitution and laws of the United States, or the Constitution and laws of this State, shall be the rule of decision in all the courts of this State.

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Nev. Rev. Stat. Ann. § 463.0129 **Public policy of state concerning gaming; license or approval revocable privilege**

1. The Legislature hereby finds, and declares to be the public policy of this state, that:

(a) The gaming industry is vitally important to the economy of the State and the general welfare of the inhabitants.

(b) The continued growth and success of gaming is dependent upon public confidence and trust that licensed gaming and the manufacture, sale and distribution of gaming devices and associated equipment are conducted honestly and competitively, that establishments which hold restricted and nonrestricted licenses where gaming is conducted and where gambling devices are operated do not unduly impact the quality of life enjoyed by residents of the surrounding neighborhoods, that the rights of the creditors

of licensees are protected and that gaming is free from criminal and corruptive elements.

(c) Public confidence and trust can only be maintained by strict regulation of all persons, locations, practices, associations and activities related to the operation of licensed gaming establishments, the manufacture, sale or distribution of gaming devices and associated equipment and the operation of inter-casino linked systems.

(d) All establishments where gaming is conducted and where gaming devices are operated, and manufacturers, sellers and distributors of certain gaming devices and equipment, and operators of inter-casino linked systems must therefore be licensed, controlled and assisted to protect the public health, safety, morals, good order and general welfare of the inhabitants of the State, to foster the stability and success of gaming and to preserve the competitive economy and policies of free competition of the State of Nevada.

(e) To ensure that gaming is conducted honestly, competitively and free of criminal and corruptive elements, all gaming establishments in this state must remain open to the general public and the access of the general public to gaming activities must not be restricted in any manner except as provided by the Legislature.

2. No applicant for a license or other affirmative commission approval has any right to a license or the granting of the approval sought. Any license issued or other commission approval granted pursuant to the provisions of this chapter or chapter 464 of NRS is a revocable privilege, and no holder acquires any vested right therein or thereunder.

3. This section does not:

(a) Abrogate or abridge any common – law right of a gaming establishment to exclude any person from gaming activities or eject any person from the premises of the establishment for any reason; or

(b) Prohibit a licensee from establishing minimum wagers for any gambling game or slot machine.

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463.151. **Regulations requiring exclusion or ejection of certain persons from licensed establishments: Persons included**

1. The Legislature hereby declares that the exclusion or ejection of certain persons from licensed gaming establishments which conduct pari-mutuel wagering or operate any race book, sports pool or games, other than slot machines only, is necessary to effectuate the policies of this chapter and to maintain effectively the strict regulation of licensed gaming.

2. The Commission may by regulation provide for the establishment of a list of persons who are to be excluded or ejected from any licensed gaming establishment which conducts pari-mutuel wagering or operates any race book, sports pool or games, other than slot machines only. The list may include any person whose presence in the establishment is determined by the Board and the Commission to pose a threat to the interests of this state or to licensed gaming, or both.

3. In making that determination, the Board and the Commission may consider any:

(a) Prior conviction of a crime which is a felony in this state or under the laws of the United States, a crime involving moral turpitude or a violation of the gaming laws of any state;

(b) Violation or conspiracy to violate the provisions of this chapter relating to:

(1) The failure to disclose an interest in a gaming establishment for which the person must obtain a license; or

(2) Willful evasion of fees or taxes;

(c) Notorious or unsavory reputation which would adversely affect public confidence and trust that the gaming industry is free from criminal or corruptive elements; or

(d) Written order of a governmental agency which authorizes the exclusion or ejection of the person from an establishment at which gaming or pari-mutuel wagering is conducted.

4. Race, color, creed, national origin or ancestry, or sex must not be grounds for placing the name of a person upon the list.

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NV GAM REG 5.011 **Grounds for disciplinary action.**

The board and the commission deem any activity on the part of any licensee, his agents or employees, that is inimical to the public health, safety, morals, good order and general welfare of the people of the State of Nevada, or that would reflect or tend to reflect discredit upon the State of Nevada or the gaming industry, to be an unsuitable method of operation and shall be grounds for disciplinary action by the board and the commission in accordance with the Nevada Gaming Control Act and the regulations of the board and the commission. Without limiting the generality of the foregoing, the following acts or omissions may be determined to be unsuitable methods of operation:

1. Failure to exercise discretion and sound judgment to prevent incidents which might reflect on the repute of the State of Nevada and act as a detriment to the development of the industry.

* * *

10. Failure to conduct gaming operations in accordance with proper standards of custom, decorum and decency, or permit any type of conduct in the gaming establishment which reflects or tends to reflect on the repute of the State of Nevada and act as a detriment to the gaming industry.