IN THE SUPREME COURT

OF THE STATE OF NEVADA

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ISRAEL BAIGUEN, an individual, Appellant, v. HARRAH'S LAS VEGAS, LLC, a Nevada Domestic Limited-Liability Company, dba HARRAH'S CASINO HOTEL, LAS VEGAS; HARRAH'S LAS VEGAS INC. dba HARRAH'S CASINO HOTEL, LAS VEGAS; CAESARS ENTERTAINMENT CORPORATION, a Nevada Foreign Corporation, dba HARRAH'S CASINO HOTEL, LAS VEGAS; DOES I through X, inclusive; and, and ROE CORPORATIONS I through X, inclusive, Respondents.	Supreme Court Case No. 70204 Appeal from Clark County District Court Case No. A-14-708544 -C

APPELLANT'S REPLY BRIEF

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NRAP 26.1 DISCLOSURE STATEMENT

The undersigned counsel of record certify that the following are persons and entities as described in NRAP 26.1 (a) and must be disclosed. These representations are made in order that the Justices of this Court may evaluate possible disqualifications or recusal.

Appellant is Israel Baiguen. Appellant has been represented exclusively by the undersigned counsel of record in this matter.

Dated this 10th day of November, 2016.

Law Offices of Steven M. Burris, LLC

By:_____

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ARGUMENT

I. RESPONDENT HARRAH'S HAS FAILED TO DEMONSTRATE THAT NO ISSUE OF MATERIAL FACT EXISTS WITH RESPECT TO WHETHER PLAINTIFF'S INJURY AROSE OUT OF AND IN THE COURSE OF HIS EMPLOYMENT

Defendant-Respondent Harrah's Las Vegas argues in its responding brief that Plaintiff-Appellant Israel Baiguen's injury AROSE out of and in the course of employment. To support their argument, Respondent contends that Mr. Baiguen, while suffering and displaying obvious stroke symptoms, was in the course of employment because he "clocked in" and "received his radio and keys necessary to perform his job duties." *See* Respondent's Brief, at 4; *see also Id.*, at 7. Both factual statements are false, as there is no evidence that Mr. Baiguen ever "clocked in" or ever received his employee radio and keys. *See* Appellant's Opening Brief, at 2-3. In fact, witness testimony from multiple witnesses all establishes that none of the witnesses ever saw Mr. Baiguen actually clock in or receive his radio and keys. *Id.* This issue alone constitutes a genuine issue of material fact regarding the two-prong analysis of compensable injuries under *Wood v. Safeway*, 121 Nev. 724, 733 (2005).

Notably, Respondent relies upon a "Declaration from the Director of Consolidated Payroll Operations" to argue that Mr. Baiguen was clocked in on the

day of the incident. *See* Respondent's Brief, at 15. However, that "Declaration" first submitted as an exhibit to Harrah's Reply Brief in support of its underlying Motion for Summary Judgment (*see* Vol. 2, APP 187-200, at 4-5), is contradicted by "time clock" documents produced by Harrah's which demonstrate that Mr. Baiguen was not clocked in on the day in question. *See* Plaintiff's Opposition to Defendant's Motion for Summary Judgment, Vol. 2, APP 132-142, at 6.

Moreover, Respondent primarily relies on an Arizona intermediate appellate court case *Dugan v. American Express Travel Related Services Co.*, 912 P.2d 1322 (Ariz. App. 1995) in justifying why it should receive NIIA immunity. In *Dugan*, the Plaintiff, Sarah Dugan, was clocked in and in the middle of her work shift when she suffered a "heart event" and lost consciousness. *Id.* at 1325. Her job responsibilities and work environment did not contribute to the cardiac episode. *Id.* After Mrs. Dugan collapsed, her co-workers attempted to call the 9–1–1 emergency telephone number to summon aid. *Id.* They were, however, unable to contact the emergency operator from the employer's telephones because, unbeknownst to the co-workers, the employer had blocked that number in favor of an in-house emergency number. *Id.* Due to the inability to reach 9–1–1 services, emergency medical assistance was delayed, and Mrs. Dugan suffered prolonged oxygen deprivation resulting in severe, irreversible brain damage. *Id.*

The Arizona intermediate court correctly noted that Arizona law specifically

delineates that a "heart-related injury" is not compensable under Arizona workers' compensation law. *Id.* at 1328. The Arizona intermediate appellate court also found that although Dugan's heart event was due to known pre-existing cardiovascular medical conditions and thus not compensable under Arizona law, the aggravation of such injury would be compensable because of the intervening incident – the delay in receiving emergency medical attention caused by the employer's action in blocking 9-1-1. *Id.*

Dugan is factually distinguishable from the case at bar, as Mr. Baiguen was not performing any job duties whatsoever when the stroke began. In fact, it is undisputed the stroke began prior to Mr. Baiguen arriving to the Harrah's parking lot. Moreover, unlike *Dugan*, where the co-workers attempted to seek out emergency medical attention immediately, Mr. Baiguen was not rendered any aid whatsoever; and instead has his supervisor Karla Young directed other employees to send him home. Lastly, Mr. Baiguen's injuries are a direct result of an uninterrupted consequence of the stroke, as he did not receive *any* medical treatment whereas Dugan experienced a *delay* in treatment.

As will be discussed further below, Respondent fails to demonstrate that there are no issues of material fact regarding whether Mr. Baiguen was performing his job duties (within the course of his employment) and whether Mr. Baiguen faced an "increased risk" due to Respondent's negligence (arising out of

employment). As mentioned above, the evidence presented demonstrates there indeed are genuine issues of material fact whether Mr. Baiguen was performing his job duties, and whether Respondent's negligence is due to an "increased risk" of the workplace environment.

A. Respondent Harrah's misrepresents the facts regarding Appellant's employment on the incident date in an attempt to apply *Wood* and *Cotton* in order to fall under NIIA immunity.

Respondent contends in its brief that Mr. Baiguen's injury arose out of his employment because it "is completely connected to the workplace," and relies on an Arizona intermediate court case, *Dugan*, to justify its position. *See* Respondent's Brief, at 18. Respond also asserts that Mr. Baiguen was "in the course of his employment" as delineated in the *MGM Mirage v. Cotton* case. 121 Nev. 396 (2005).

The basis for Respondent's argument regarding Mr. Baiguen's injury is that it occurred within the course of, and arose out of, his employment primarily because it "occurred in the Housekeeping Office at the start of the shift after Baiguen went to the window at which he received the radio and keys necessary to perform his job duties" (*see* Respondent's Brief, at 7) and therefore "Baiguen was in the course of his employment." *Id.*

Respondent relies upon *Cotton* to argue that because Mr. Baiguen was in the workplace area during the stroke and at the time when the negligence occurred, the

injury therefore falls under the NIIA, since the Court in *Cotton* found that Cotton's injury was connected with the employment despite Cotton not being clocked in at the time of injury. *See Cotton*, 121 Nev., at 400. However, Respondent's reliance on *Cotton* is misplaced, as the Court in *Cotton* clearly states that an injury merely occurring at the workplace does automatically result in NIIA immunity:

> Cotton's situation is that of an employee injured on the employer's premises as the employee arrived for work. Although Nevada has not expressly adopted a ***premises-related exception*** to the going and coming rule, other states have. Many jurisdictions recognize that "[o]ne exception to the 'going and coming' rule is the 'parking lot' rule: ***An injury sustained on an employer's premises while an employee is proceeding to or from work is considered to have occurred 'in the course of employment.'***
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> . . . .
>
> We emphasize that the inquiry is two-fold. If an employee establishes that an injury occurred in the course of employment, she also must show that the injury "arose out of" the employment. In this case, Cotton was on the employer's premises as she walked from the employer's parking lot to the employer's sidewalk entrance about ten minutes before she was scheduled to work. ***She tripped over the curb, part of the workplace environment, and injured her ankle***. Thus, Cotton first showed that her injury occurred in the course of employment because she was injured within a reasonable time before starting work. Second, she demonstrated that her injury arose out of her employment because she established the ***causal link between the injury and workplace conditions or workplace environment***.

Id. at 400-401 (emphasis added).

The Court in *Cotton* held that the "premises-related exception" is for instances where injuries arise out of the employers' premises while employees are going into work: "Under a parking lot or premises-related exception to the going and coming rule, injuries sustained on the employer's premises while the employee is proceeding to or from work, within a reasonable time, are sufficiently connected with the employment to have occurred "in the course of employment." *Id.* at 400.

Here, it is undisputed that Mr. Baiguen was already suffering from a stroke prior to his arrival at Harrah's Las Vegas. Moreover, it is undisputed that the stroke itself is not being alleged as the injury for which Harrah's is liable but that the claim alleged is for Respondent's negligence in failing to render aid to Mr. Baiguen, and instead choosing to take him home at a critical time of need at the direction of Respondent's department manager, Karla Young. As a result of that choice to take Mr. Baiguen home rather than seek aid for him, Mr. Baiguen suffered serious long term damages that could have been prevented had he been provided with an appropriate response at the time of his stroke, beginning with the summoning of medical aid. These specific damages are recoverable under Nevada's 'loss of chance doctrine.' Nevada's 'loss of chance doctrine' provides that "the injury to be redressed by the law is not defined as the [injury] itself, but, rather, as the decreased chance of survival caused by the [negligence]." *Perez v. Las Vegas Med. Ctr.*, 107 Nev. 1, 7 (1991).

Therefore, it is clear that the "premises-related exception" does not apply here, as the injury alleged did not arise out of (or in any way connected to) Respondent's premises, but because Mr. Baiguen's co-workers and supervisors failed to render aid at a critical time of need. Therefore, *Cotton* is not instructive, but *Lee v. GNLV Corp.*, 117 Nev. 291, 295 (2001) is. ("where a special relationship exists between the parties, such as with an innkeeper-guest, teacher-student or employer-employee, an affirmative duty to aid others in peril is imposed by law"). Due to the special relationship between Mr. Baiguen and Respondent, Respondent had an affirmative duty to render aid. That duty was breached, and Mr. Baiguen incurred injury and damages as a result; with 'loss of chance' as one such injury claimed under *Perez.*

Respondent also contends that Mr. Baiguen "was in the course of his employment" based on the false premise that he "received the radio and keys necessary to perform his job duties." *See* Respondent's Brief, at 7. This is a factual misrepresentation by Respondent in an attempt to seek cover under the *Wood v. Safeway, Inc.* analysis regarding whether an employee's injury occurred in the course of employment. 121 Nev. 724, 733 (2005). As discussed above, there has been no evidence that demonstrates Mr. Baiguen ever received his employee radio and keys. *See* Appellant's Opening Brief, at 2-3. Also, as previously discussed, the issue of whether Mr. Baiguen clocked in is disputed, at best.

Accordingly, Respondent's assertion that Mr. Baiguen was "reasonably performing job duties" is meritless, as there is no undisputed evidence to demonstrate the same. In fact, all of the witness testimony unanimously corroborates that Mr. Baiguen was mute, drooling and not able to perform any job duties whatsoever. In fact it was because of Mr. Baiguen's visibly ill appearance that Respondent's department manager Karla Young directed Mr. Baiguen's co-workers to take him home. It is clear that Mr. Baiguen was unable to perform any of his normal job duties whatsoever while he was on Harrah's premises on October 19, 2012, and there is no evidence which establishes that Mr. Baiguen ever (1) clocked in; (2) received any employee equipment; or (3) attempted to perform any job duties. Therefore it is clear that Mr. Baiguen was not "reasonably performing his job duties" as contemplated by *Wood*, and thus there are genuine issues of material fact precluding summary judgment regarding whether Mr. Baiguen's claim falls to NIIA immunity.

B. Respondent Harrah's misstates *Phillips* when applying the location of Plaintiff's incident.

Respondent concedes that suffering a stroke at the workplace is a personal risk. *See* Respondent's Brief, at 8. However, Respondent argues that the "risk experienced by Baiguen in the Harrah's workplace was not neutral, but employment related." *Id.* at 9. Respondent contends that because Mr. Baiguen was in the "back of the house" when the underlying events unfolded, he "faced a

greater risk in these areas than members of the general public." *Id.*; *see also Id*. at 22. Respondent asserts that because the general public does not have access to the "back of the house," the location in and of itself establishes that the risk is an increased risk to Mr. Baiguen.

However, Respondent's argument misapplies the reasoning of *Rio All Suites Hotel and Casino v. Phillips*, 126 Nev. 346 (2010). The Court in *Phillips* went to great lengths to delineate what would constitute a "personal risk" versus an "increased risk" due to the workplace environment: "Personal risks are those that are 'so clearly personal that, even if they take effect while the employee is on the job, they could not possibly be attributed to the employment. For example, a fall caused by the [employee's] personal condition, such as a bad knee, epilepsy, or multiple sclerosis, is a personal risk.'" *Id.* at 351 (internal citations omitted). Under the increased-risk test, the *Phillips* Court held the following:

> [A]n employee may recover if she is subjected to a risk greater than that to which the general public [is] exposed. Even if a risk to which the employee is exposed "is [not] qualitatively ... peculiar to the employment," the injury may be compensable as long as she faces an "increased quantity of a risk." Thus, when an employee "is exposed to a common risk more frequently than the general public," there may be an increased risk.

Id. at 353 (internal citations omitted).

It is obvious that simply being in the "back of the house" while Respondent's employees failed to render aid does not amount to an "increased risk" an employee would experience versus the general public. Respondent's

failure to render aid to Mr. Baiguen could have occurred anywhere on Respondent's property. The location of Mr. Baiguen at the time of the underlying incident has no correlation to Respondent's negligence in failing to render aid. For example, Respondent could similarly fail to render aid to a guest/ invitee on the casino floor, and be found liable for negligence due to failing to render aid under *Lee*. Likewise, just because Mr. Baiguen happened to be in the "back of the house" when Respondent failed to render aid does not result in some "increased risk" versus Mr. Baiguen being on the casino floor or in a guest room hallway or any number of other publically accessible locations on the property at the time of the occurrence. As held under *Lee*, Respondent's duty to render aid is identical with respect to both the guest/invitee and to employees. No special exception for the "back of the house" exists. Neither *Phillips* nor *Lee* put arbitrary physical boundaries on where duties are owed to either employees or guests/invitees within the confines of the property.

Therefore, it is clear that Mr. Baiguen being in the "back of the house" does not create exposure "to a common risk more frequently than the general public" as held under *Phillips*. Respondent had a duty to render aid to Mr. Baiguen and every other employee, just as Respondent similarly has a duty to render aid to any of its guests/invitees. It is undisputed that Harrah's failed to render aid to Mr. Baiguen. That failure could have occurred at any location, front or back of the house, to any

person, employee or guest, on Respondent's property. Therefore, it is not an "increased risk" unique to only Respondent's employees. The risk of being ignored during a medical episode is clearly a neutral risk, as Respondent has the equal duty to render aid to its employees as well as any other person on its property. Accordingly, Respondent's argument that Mr. Baiguen's risk was "employment related" is without merit.

Consequently, the District Court's failure to apply the "increased-risk" test as set forth in *Phillips* is reversible error, and summary judgment should be reversed and the case remanded.

C. Causation is not an issue an appeal, as the District Court made no findings regarding the causal connection of Plaintiff's injuries and damages.

Respondent spends the remainder of its brief arguing the causal connection between Respondent's negligence and Mr. Baiguen's injuries. Causation is not an issue on appeal in this case as clearly acknowledged by Respondent in its own brief which clearly states that the two issues under review are (1) whether Mr. Baiguen's injuries arose out of and within the course of employment; and (2) whether the District Court correctly came to its findings despite the "increased risk" test under *Phillips*. *See* Respondent's Brief, at 1. Therefore this Court should not consider Respondent's arguments regarding causation on appeal.

However, should this Court still consider the merits of Respondent's arguments regarding causation of Mr. Baiguen's injuries, it should still dismiss Respondent's arguments as there is a genuine issue of material fact whether Respondent's negligence caused further injury and damage to Mr. Baiguen. Respondent cites to Mr. Baiguen's own expert, Dr. Shprecher, to illustrate Mr. Baiguen's likelihood of recovery had Respondent properly rendered aid in a timely manner. *See* Respondent's Brief, at 23. Respondent notes Dr. Shprecher's opinion that "if t-PA had been administered, on average it improves by 30% the chances that the patient will recover to a level of minimal or no disability." *Id.* Respondent then argues: "However, there was no guarantee that Baiguen's personal situation would have fallen into this 30%." *Id.*

Respondent argument fails on two counts: (1) the *Perez* case allows a plaintiff to seek damages for decreased chance of recovery ('loss of chance doctrine'); and (2) the very contention that "there was no guarantee that Baiguen's personal situation would have fallen into this 30%" is a genuine issue of material fact, and therefore should not be summarily adjudicated. As already discussed above, Nevada law under *Perez* allows a plaintiff to recover for the decreased chance of survival caused by the defendant's negligence. *Perez*, 107 Nev., at 7. Further, Respondent's assertion that "there was no guarantee" that Mr. Baiguen would benefit from the t-PA treatment is mere opinion and clearly exhibits a

genuine issue of material fact for a jury to resolve. Therefore, neither of Respondent's arguments regarding causation are issues which could be summarily adjudicated and are only for the trier of fact to determine.

CONCLUSION

Respondent's Brief does not establish that there are no genuine issues of material fact regarding whether Mr. Baiguen was within the course of his employment when the underlying injury occurred. Moreover, Respondent failed to demonstrate that the undisputed facts of this case can satisfy both prongs of the *Wood* test. Further, Respondent misapplies both *Cotton* and *Phillips* in attempting to show that Mr. Baiguen's injuries are work related, when in fact a review of both cases shows indicates the opposite. There is simply no undisputed evidence in this case that Mr. Baiguen was reasonably performing his job duties at any time on October 19, 2012. Harrah's weak reliance upon a single Arizona intermediate court case to justify the District Court's decision in this case simply falls short when placed against controlling Nevada law. The affirmative duty imposed upon Harrah's by Nevada law to render aid to a party in peril, applies regardless of where on the property the party is located. Consequently, a genuine issue of material fact exists whether Mr. Baiguen's injury arose out of his employment and occurred within the course and scope of his employment.

For the foregoing reasons, the Respondent's Brief falls short of countering why the District Court's entry of summary judgment should be reversed and the case should be remanded for further proceedings.

Dated this 10 day of November, 2016.

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CERTIFICATE OF COMPLIANCE

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

2. I further certify that this brief complies with the page or type volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it does not exceed 15 pages.

3. Finally, I hereby certify that I have read this opening 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 records to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relief on is to be found. I understand that I may be subject to

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sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 10 day of November, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the Law Offices of Steven M. Burris LLC and that on the 10th day of November 2016, pursuant to N.E.F.C.R 8, I electronically filed and served a true and correct copy of the above and foregoing APPELLANT'S OPENDING BRIEF (as resubmitted) as follows:

[X] by the Court's CM/ECF system which will send notification to the following; and

[X] by US mail at Las Vegas, Nevada, postage prepaid thereon, addressed to the following:

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