IN THE SUPREME COURT OF THE STATE OF NEVADA

ISRAEL BAIGUEN, an individual, Appellant, vs. 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, ROE CORPORATIONS I though X, inclusive, Respondents.	Supreme Court No. 70204 Appeal from Clark County District Court Case No. A708544

RESPONDENT'S ANSWERING BRIEF

FISHER & PHILLIPS LLP
SCOTT M. MAHONEY, ESQ.
Nevada Bar No. 1099
300 S. Fourth Street
Suite 1500
Las Vegas, NV 89101
Telephone: (702) 252-3131
Attorney for Respondents
Harrah's Las Vegas, LLC and
Caesars Entertainment Corporation

FISHER & PHILLIPS LLP
300 S. Fourth Street, Suite 1500
Las Vegas, Nevada 89101

NRAP 26.1 DISCLOSURE STATEMENT

The undersigned counsel of record certifies that the following are the 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 disqualification or recusal.

Respondents, Harrah's Las Vegas, LLC and Caesars Entertainment Corporation, are represented in this proceeding, and were represented in the case below, by the law firm of Fisher & Phillips, LLP. Harrah's Las Vegas, LLC dba Harrah's Casino Hotel Las Vegas is a wholly-owned subsidiary of Caesars Entertainment Resort Properties, LLC, which is wholly-owned by Caesars Entertainment Resort Properties Holdco, LLC, which is wholly-owned by Caesars Entertainment Corporation, which is a publicly-traded corporation.

Dated this 12th day of October 2016.

FISHER & PHILLIPS LLP

By: _____

Scott M. Mahoney, Esq.
Nevada Bar No. 1099
300 South Fourth Street
Suite 1500
Las Vegas, NV 89101
Attorneys for Respondents

FISHER & PHILLIPS LLP
300 S. Fourth Street, Suite 1500
Las Vegas, Nevada 89101

FISHER & PHILLIPS LLP
300 S. Fourth Street, Suite 1500
Las Vegas, Nevada 89101

TABLE OF CONTENTS

FISHER & PHILLIPS LLP
300 S. Fourth Street, Suite 1500
Las Vegas, Nevada 89101

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

FISHER & PHILLIPS LLP
300 S. Fourth Street, Suite 1500
Las Vegas, Nevada 89101

Other Authorities

FISHER & PHILLIPS LLP
300 S. Fourth Street, Suite 1500
Las Vegas, Nevada 89101

JURISDICTIONAL STATEMENT

Respondents agree with the Jurisdictional Statement contained in Appellant's Opening Brief (the "Opening Brief").

ROUTING STATEMENT

Respondents agree with the Routing Statement contained in the Opening Brief.

STANDARD OF REVIEW

Respondents agree that an order granting summary judgment is reviewed *de novo*. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the District Court correctly determined that Baiguen's negligence claim is preempted by worker's compensation because his alleged injuries arose out of alleged acts or omissions of Harrah's employees occurring in the workplace at a time when Baiguen was in Harrah's Housekeeping Department and beginning the tasks associated with his work.

2. Whether the District Court correctly found that its determination was not altered by the "increased risk" test, an issue which Baiguen did not even raise until the summary judgment hearing.

FISHER & PHILLIPS LLP
300 S. Fourth Street, Suite 1500
Las Vegas, Nevada 89101

FISHER & PHILLIPS LLP
300 S. Fourth Street, Suite 1500
Las Vegas, Nevada 89101

STATEMENT OF THE CASE

Israel Baiguen ("Baiguen"), a former employee of Harrah's Las Vegas, LLC dba Harrah's Casino Hotel Las Vegas ("Harrah's"), filed a Complaint against Harrah's and Caesars Entertainment Corporation ("Caesars") claiming that but for the alleged negligent acts or omissions of Harrah's employees occurring in the workplace on October 19, 2012, the consequences of a stroke he supposedly suffered on that day could have been avoided or mitigated. (App. Vol. 1 00002-00006).[1] Respondents moved for summary judgment. At the hearing, Baiguen agreed that summary judgment in favor of Caesars was appropriate. (App. Vol. 2 00209:16 – 00210:2).[2] Following argument, the District Judge also granted summary judgment to Harrah's, finding that Baiguen's claim was preempted by worker's compensation because his injuries arose out of and in the course of his employment. (App. Vol. 2 00232-00234). Baiguen

[1] Herein, "App. Vol. 1" shall refer to Appellant's Appendix, Vol. 1 and "App. Vol. 2" shall refer to Appellant's Appendix, Vol. 2.

[2] Despite this statement on the record, presumably erroneously, Baiguen's Case Appeal Statement identifies Caesars as one of the Respondents involved in the appeal. (App. Vol. 2 00238:5-8). Caesars was and is a parent company of Harrah's and had no employment relationship with Baiguen or any other nexus to this case. The Opening Brief does not make any arguments contesting the granting of summary judgment to Caesars and the issue will not be discussed further in this Answering Brief.

filed a Notice of Appeal. (App. Vol. 2 00235-00236).

STATEMENT OF FACTS

In 2012 (and presently) Harrah's was the employer of the employees working at the Harrah's Hotel Casino in Las Vegas. (App. Vol. 1 00044 ¶ 3). On October 19, 2012, Baiguen's significant other, Estrelita Bradley, visited his apartment, leaving at approximately 3:30 p.m., at which time she testified that Baiguen "[s]eemed okay" and "looked normal," although "I don't know inside his body." (App. Vol. 1 00052:6 – 00053:2). Bradley testified that she saw Baiguen get in his car to leave for work. (App. Vol. 1 00053:3-8).[3]

Baiguen's shift started at 4:30 p.m. (App. Vol. 1 00065:7-22). Houseperson, Romalito Santaren, testified that on October 19 he saw Baiguen in an area of the parking garage where employees congregated before it was time to clock-in, with Baiguen arriving between 4:10 and 4:15 p.m. (App. Vol. 1 00063:9-15; 00066:5-25; 00067:14 – 00068:5). Santaren testified that Baiguen then walked under his own power down to the Housekeeping Office area. (App. Vol. 1 00071:20 – 00072:8). There,

[3] Baiguen resided in an apartment at 4630 Koval Lane. (App. Vol. 1 00129 ¶ 2; 00131). Respondents asked the District Court to take judicial notice that this is 1.40 miles from Harrah's (3475 Las Vegas Boulevard South). (App. Vol. 1 00044 ¶ 3; 00059).

FISHER & PHILLIPS LLP
300 S. Fourth Street, Suite 1500
Las Vegas, Nevada 89101

Baiguen clocked-in. (App. Vol. 2 00200 ¶ 3). Baiguen also got in line to get his radio and keys. (App. Vol. 1 00073:12-14).

Housekeeping Supervisor, Mercedes Raez, met Baiguen at the window where radios and keys were passed out and asked Baiguen if he needed these items; Baiguen did not respond. A co-worker, Lucito, told Raez that Baiguen was "not good." (App. Vol. 1 00083:2-19; 00084:16-23). Raez then reported to Assistant Housekeeping Manager, Karla Young, that "Israel is not fine." (App. Vol. 1 00085:6-13; 00089:9-12). Young briefly saw Baiguen at about 4:30 p.m. and he did not respond (which from her perspective, was not unusual because he typically did not respond to her). Santeren asked Young if he could assist Baiguen in getting a ride home, and Young said yes. (App. Vol. 1 00074:8-19; 00075:4-16; 00090:11 – 00091:24).

Santeren arranged to have two Maids take Baiguen home. (App. Vol. 1 00095:12 - 00096:25). (There is no evidence anyone in Harrah's management was involved in the logistics of getting Baiguen home). Bradley claimed to next see Baiguen again two days later, and took him to the hospital, where he was diagnosed as having suffered a stroke. (App. Vol. 1 0004 ¶ V; 00054:13-17; 00055:21 – 00056:7).

FISHER & PHILLIPS LLP
300 S. Fourth Street, Suite 1500
Las Vegas, Nevada 89101

In October 2012, t-PA[4] was the only FDA-approved treatment for acute ischemic stroke. (App. Vol. 1 00112:9-12).[5] For patients who have diabetes such as Baiguen, there is a three-hour window to administer t-PA from the onset of stroke symptoms. (App. Vol. 1 00112:13 – 00113:6).

It is important to have an "historian that [can] attest to [the] time when [the] stroke symptoms started" and be "very confident" about the patient's "last seen well" time because risks such as bleeding can outweigh the potential benefits if t-PA is administered outside the three-hour window. (App. Vol. 1 00114:4-17; 00115:18 – 00117:9; 00118:6-8). Even administering t-PA within the window can result in death. (App. Vol. 1 00119:1 – 00120:4). While Dr. Shprecher presumes Baiguen's stroke started sometime between 3:30 p.m. and the time he arrived to work on October 19, 2012, it is possible the stroke started earlier and that Bradley did not notice the onset of the symptoms. (App. Vol. 1 00108:16-25; 00109:17-24; 00110:17 – 00111:8).

///

///

[4]t-PA is an acronym for tissue plasminogen activator, which is a blood clot-busting medication. (App. Vol. 1 00104).

[5] Unless otherwise indicated, this and all the remaining citations to the record in this section are to the report or deposition testimony of Baiguen's expert, Dr. Shprecher.

FISHER & PHILLIPS LLP
300 S. Fourth Street, Suite 1500
Las Vegas, Nevada 89101

Under the best case scenario, t-PA would likely not be administered until about 40 minutes after a patient's arrival at the Emergency Room, what Dr. Shprecher referred to as "door to needle time." (App. Vol. 1 00121:2-21). Dr. Shprecher agreed with Dr. Selco's[6] estimate that, on average, only about 50% of patients get t-PA within an hour of arrival. (App. Vol. 1 00122:6-13).

Dr. Shprecher's report states: "When administered within 3 hours of when symptoms start, t-PA improves the chance that a stroke patient will recover (within 3 months) to have minimal or no disability by 30%." (App. Vol. 1 00104). This did not necessarily mean that Baiguen personally would have benefitted from the treatment. (App. Vol. 1 00123:9 – 00124:6). As Dr. Shprecher testified: "None of these treatments are like with penicillin where you cure the infection and it is guaranteed . . . There is just . . . percentage chances of improvement." (App. Vol. 1 00120:13-17).

SUMMARY OF ARGUMENT

"The NIIA[7] provides the exclusive remedy for employees injured on the job, and an employer is immune from suit by an employee for injuries

[6] Dr. Selco is Respondents' rebuttal expert.

[7] The Nevada Industrial Insurance Act, NRS Chapters 616A to 616D.

FISHER & PHILLIPS LLP
300 S. Fourth Street, Suite 1500
Las Vegas, Nevada 89101

arising out of and in the course of the employment." *Wood*, 121 Nev. at 732, 121 P.3d at 1031 (citation and internal quotation marks omitted).

The "in the course of employment" requirement refers "to the time and place of employment, *i.e.*, whether the injury occurs at work, during working hours, and while the employee is reasonably performing his or her duties." *Wood*, 121 Nev. at 733; 121 P.3d at 1032 (citation omitted). The alleged negligence of Harrah's for which Baiguen seeks to recover 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. Pursuant to the principles set forth in *MGM Mirage v. Cotton*, 121 Nev. 396, 400-401, 116 P.3d 56, 58-59 (2005), Baiguen was in the course of his employment.[8]

"An injury is said to arise out of one's employment when there is a causal connection between the employee's injury and the nature of the work or workplace." *Wood*, 121 Nev. at 733; 121 P.3d at 1032 (citation omitted). Employment-related risks arise out of one's employment, while personal ones generally do not. *Rio All Suite Hotel & Casino v. Phillips*,

[8] In *Cotton*, this Court found that the "injury arose out of and in the course of [Cotton's] employment" even though it occurred in the employee parking lot outside the MGM about ten minutes before the start of Cotton's shift. *Id.*, at 57; 59.

FISHER & PHILLIPS LLP
300 S. Fourth Street, Suite 1500
Las Vegas, Nevada 89101

126 Nev. 346, 351, 240 P.3d 2, 5 (2010) (citations and internal quotation marks omitted).

Typically, suffering a stroke at work would constitute a personal risk that would not be covered by worker's compensation. Here, however, Baiguen is not contending that Harrah's is liable because it caused his stroke. The theory of the liability is that the stroke coupled with the alleged inadequate response of Harrah's employees to the symptoms of stroke combined to deprive Baiguen of the opportunity to receive treatment during the limited period of time he had to receive t-PA and possibly mitigate or avoid the consequences of the stroke.

This case is very similar to *Dugan v. American Express Travel Related Services Company, Inc.*, 912 P.2d 1322 (Ariz. App. 1995), in which the court affirmed summary judgment granted to the employer on a negligence claim based on worker's compensation being the exclusive remedy. In *Dugan*, the combination of the employee's heart event and a delay in being able to obtain emergency medical relief due to the employer's decision to block the ability to call 911 caused irreversible brain damage which was deemed to constitute an accident for purposes of Arizona's worker's compensation statutes. *Id.*, at 1328-29.

FISHER & PHILLIPS LLP
300 S. Fourth Street, Suite 1500
Las Vegas, Nevada 89101

Baiguen contends the court below erred in failing to apply the "increased-risk" test enunciated in *Phillips*, under which he claims his injury would have been found to not be covered by worker's compensation. However, this test is only applied to "determine whether an injury resulting from a *neutral risk* is compensable." *Id.*, 126 Nev. 346 at 353, 240 P.3d at 6 (emphasis added). The risk experienced by Baiguen in the Harrah's workplace was not neutral, but employment-related.

Even if, *hypothetically*, the risk was neutral such that the increased-risk test applied, worker's compensation coverage exists if the employee "is subjected 'to a risk greater than that to which the general public [is] exposed.'" *Phillips*, 126 Nev. 346 at 353, 240 P.3d at 7 (citation omitted). The general public typically has no authorized access to "back of the house" areas such as the employee parking garage and the Housekeeping Office (where Baiguen performed activities upon arrival at work). Baiguen was in these areas when he supposedly exhibited his stroke symptoms and purportedly needed medical assistance. To the extent there was a risk that his co-workers would not recognize the symptoms of a stroke and/or not know to promptly summon medical attention in response thereto, Baiguen faced a greater risk in these areas than members of the general public.

FISHER & PHILLIPS LLP
300 S. Fourth Street, Suite 1500
Las Vegas, Nevada 89101

Finally, even if Baiguen's negligence claim is not preempted by worker's compensation (which it is), he cannot establish the element of causation. At most, Baiguen can only establish that if a number of things had happened, he might have been able to receive a treatment (t-PA) that is successfully administered to about 30% of the patients who receive it (but did not definitely offer Baiguen himself a 30% chance of recovery from his stroke). This is insufficient to apply the "loss of chance" doctrine, which has in the past been limited to medical malpractice cases.

ARGUMENT

WORKER'S COMPENSION IS BAIGUEN'S EXCLUSIVE REMEDY

Introduction

Baiguen's sole claim is for negligence. The Complaint contends the alleged acts or omissions of Harrah's employees squandered the "`golden window' of time in which to effectively diagnose and treat a stroke when it first manifests itself," and that as a result, the "stroke was proximately and/or legally caused by, or worsened by, or the chances of avoiding or mitigating or treating [the] same were significantly decreased by, the delay in diagnosis and treatment caused by Defendants." (App. Vol. 1 00004 ¶ VI).

FISHER & PHILLIPS LLP
300 S. Fourth Street, Suite 1500
Las Vegas, Nevada 89101

Citing *Lee v. GNLV Corp.*, 117 Nev. 291, 22 P.3d 209 (2001), Baiguen claims Harrah's had the same duty to render him aid as it does to its guests. (Opening Brief, p. 15). *Lee* does hold that when "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." *Id.*, 117 Nev. at 295, 22 P.2d at 209 (citations omitted). This is consistent with the Restatement (Third) of Torts § 40 (2012).

However, while *Lee* has occasionally since been cited by the Nevada Supreme Court in support of the proposition that there are various types of special relationships out of which arises a duty to aid others in peril, this Court has never actually cited *Lee* in holding that an employee can state a negligence claim if his or her employer fails to come to his or her aid. This is because any duty owed by an employer to an employee is normally preempted by worker's compensation. *See,* Restatement (Third) of Torts § 40 (2012), comment k ("Workers' compensation has displaced most common-law occupational tort claims. Where workers' compensation is applicable, it governs employer liability for employees' occupational injuries").

FISHER & PHILLIPS LLP
300 S. Fourth Street, Suite 1500
Las Vegas, Nevada 89101

"The NIIA provides the exclusive remedy for employees injured on the job, and an employer is immune from suit by an employee for injuries arising out of and in the course of the employment." *Wood*, 121 Nev. at 732, 121 P.3d at 1031 (citation and internal quotation marks omitted). *See, also,* NRS 616A.020(1).[9] As demonstrated below, Baiguen's injury both arose out his employment and occurred during the course of his employment.

Baiguen's Alleged Injuries Occurred In The Course Of His Employment

Considering first the requirement that Baiguen's alleged injuries occurred during the course of his employment, this refers "to the time and place of employment, *i.e.*, whether the injury occurs at work, during working hours, and while the employee is reasonably performing his or her duties." *Wood*, 121 Nev. at 733; 121 P.3d at 1032 (citation omitted).

[9] NRS 616A.020(1) refers to an injury "by accident." "Accident" is defined by NRS 616A.030 as "an unexpected or unforeseen event happening suddenly or violently, with or without human fault, and producing at the time objective symptoms of an injury." That Baiguen would experience a stroke on October 19, 2012 was unforeseen, sudden and produced objective symptoms such as the inability to speak. As to the requirement of occurring "violently," this is satisfied when there is "any cause efficient in producing a harmful result." *Conway v. Circus Circus Casinos, Inc.*, 116 Nev. 870, 876, 8 P.3d 837, 841 (2000).

FISHER & PHILLIPS LLP
300 S. Fourth Street, Suite 1500
Las Vegas, Nevada 89101

Baiguen contends "[h]is injury: (1) did not occur at work, but rather just at his employer's premises; (2) did not occur during working hours because he never clocked in and was sent home; and (3) he was not performing any of his job duties." (Opening Brief, p. 14). Baiguen is wrong on all counts.

The alleged "injury" in this case results from Harrah's failure to render aid to Baiguen when he was supposedly displaying classic signs of suffering a stroke. Baiguen does not pinpoint the exact time of Harrah's alleged negligence. Presumably, it was about the time that Housekeeping Supervisor Raez and Assistant Housekeeping Manager Young,[10] encountered Baiguen.[11] Young believes she saw Baiguen at close to 4:30 p.m. (App. Vol. 1 00090:3-8). Although the shift started at 4:30 p.m., employees were expected to clock-in at 4:23 p.m. (App. Vol. 1 00065:7-22; App. Vol. 2 00168, p. 35:3-14). Baiguen was in the Housekeeping area at this time. (App. Vol. 1 00071:16 – 00072:14).

[10] At several points in the Opening Brief, Young is identified as the department manager. She was actually the Assistant Housekeeping Manager. (App. Vol. 1 00089:9-12).

[11] Page 3 of the Opening Brief states: "Despite the fact that Mr. Baiguen was displaying classic signs of stroke none of his co-workers, including his supervisor Mercedes Raez and his department manager Karla Young, . . . ever summoned emergency medical assistance or notified the hotel security department."

FISHER & PHILLIPS LLP
300 S. Fourth Street, Suite 1500
Las Vegas, Nevada 89101

The contention that Baiguen was not "at work" in the 4:23 – 4:30 p.m. timeframe is ludicrous. In *Cotton,* this Court held that "an employee injured on the employer's premises while proceeding to or from work within a reasonable interval before or after work may be entitled to worker's compensation." *Id.,* 121 Nev. at 400-401, 116 P.3d at 58-59. The court found that the "injury arose out of and in the course of [Cotton's] employment" even though it occurred in the employee parking lot outside the MGM about ten minutes before the start of Cotton's shift. *Id.*, at 57; 59.

Here, there is an even stronger basis for finding that the injury occurred during the course of employment, as Harrah's alleged negligence occurred as Baiguen's shift was starting, in the area where Baiguen commenced his workday. *Cotton* was cited by Harrah's in the briefing before the lower court. Baiguen fails to cite (let alone tackle) *Cotton* in his Opening Brief, pretending that this issue-deciding precedent does not exist.

Baiguen also claims that "[w]itness testimony indicates Mr. Baiguen did not clock in that day and documents produced by Harrah's during the course of the litigation indicate that Mr. Baiguen did not clock in for work at any time on October 19, 2012." (Opening Brief, p. 11). The "witness testimony" portion of the previous sentence apparently is a reference to

FISHER & PHILLIPS LLP
300 S. Fourth Street, Suite 1500
Las Vegas, Nevada 89101

"Mr. Santaren stat[ing that] he did not see Mr. Baiguen clock in at any time on October 19, 2012." (Opening Brief, p. 11). Mr. Santaren's testimony was that he saw Baiguen with his badge in his hand to clock-in, but does not know if he actually did. (App. Vol. 1 00073:1-11). This is not an affirmative statement that Mr. Baiguen "did not clock in that day."

Most importantly, there was evidence in the record that Baiguen *did* clock-in on October 19. Specifically, during the summary judgment briefing in the lower court, Harrahs submitted a Declaration from the Director of Consolidated Payroll Operations stating that Baiguen clocked-in at 4:26 p.m. on that day. Once again, Baiguen chooses to completely ignore a portion of the record that contains inconvenient, indisputable facts.[12]

Finally, Baiguen contends he was not performing any job duties at the time he was injured and that "[n]o testimony or other evidence indicates that Mr. Baiguen 'started doing the[se] preliminary activities' to commence his workday as was found by the District Court." (Opening

[12] Harrah's would also note that even if it were true that Baiguen did not clock-in on October 19, this would not mean that he was not acting in the course of his employment when the injury occurred. If clocking-in were the litmus test, then an employee who forgot or deliberately failed to clock-in on a particular day and was injured after working two hours would not be covered by worker's compensation.

FISHER & PHILLIPS LLP
300 S. Fourth Street, Suite 1500
Las Vegas, Nevada 89101

Brief, p. 11). The undisputed facts are that before Young okayed Santaren's request to have someone take Baiguen home, he had gotten into the line, and reached, the window where he receives the radio and keys he used to perform his job. (App. Vol. 1 00073:12-14; 00084:16-23).

If the employee in *Cotton* was deemed to be in the course of employment in the parking garage ten minutes before the start of his shift, then Baiguen was clearly acting in the course of employment when he was punched-in and in the Housekeeping Department receiving the items needed to start the workday. The District Court correctly found that undisputed facts established that Baiguen was in the course of his employment when his alleged injuries occurred.

Baiguen's Alleged Injuries Arose Out Of His Employment

"An injury is said to arise out of one's employment when there is a causal connection between the employee's injury and the nature of the work or workplace." *Wood*, 121 Nev. at 733; 121 P.3d at 1032 (citation omitted).

> [An injury is covered by worker's compensation when] the origin of the injury is related to some risk involved within the scope of employment . . .
>
> [D]etermining the type of risk faced by the employee is an important first step in analyzing

FISHER & PHILLIPS LLP
300 S. Fourth Street, Suite 1500
Las Vegas, Nevada 89101

> whether the employee's injury arose out of her employment . . .
>
> The types of risks that an employee may encounter are categorized as those that are solely employment related, those that are purely personal, and those that are neutral . . .
>
> Generally, injuries caused by employment-related risks are deemed to arise out of employment . . .
>
> 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. *Phillips*, 126 Nev. 346, 350-351, 240 P.3d 2, 5 (2010) (citations and internal quotation marks omitted).

Baiguen contends "his stroke and any subsequent injuries related to his stroke, are 'personal risks' not reasonably attributable to his employment with Harrah's." (Opening Brief, p. 6). [See, also, Opening Brief, p. 16 ("Mr. Baiguen's stroke, combined with Defendants' failure to render aid to him, is a personal risk that is clearly not 'attributed to the employment'")].

Harrah's agrees that based on the facts of this case, Baiguen suffering a stroke on or about October 19, 2012 is a personal risk and not work-related. However, Baiguen does not claim in his suit that the alleged

FISHER & PHILLIPS LLP
300 S. Fourth Street, Suite 1500
Las Vegas, Nevada 89101

negligence of Harrah's *caused* the stroke. Instead, Baiguen seeks to recover because of various alleged negligent acts or omissions of Harrah's employees, as itemized in Paragraph VIII of the Complaint, such as alleged inadequate training, a lack of effective procedures and a failure to call for medical assistance. (App. Vol. 1 0005 ¶ VIII). As summarized in the Opening Brief: "The injury for which Mr. Baiguen seeks compensation in this case is the loss of chance from recovery of the underlying stroke resulting from the Defendants' negligence in responding to the obvious signs of stroke exhibited by Israel Baiguen on the afternoon of October 19, 2012." (Opening Brief, pp. 8-9).

Thus, the alleged negligence for which Baiguen seeks to recover is completely connected to the Harrah's workplace. This is demonstrated by *Dugan*. Dugan had a "heart event" at work. Her co-workers tried to call 911, but could not do so because the company "had blocked that number in favor of an in-house emergency number." *Id.*, 912 P.2d at 1325. "Due to the inability to reach [911] . . ., emergency medical assistance was delayed, and Mrs. Dugan suffered prolonged oxygen deprivation . . . resulting in severe, irreversible brain damage." *Id.*, at 1325. Dugan filed a negligence lawsuit.

FISHER & PHILLIPS LLP
300 S. Fourth Street, Suite 1500
Las Vegas, Nevada 89101

Similarly, here, Baiguen perhaps exhibited stroke symptoms while in the workplace, he claims there was a delay in receiving medical treatment due to decisions made by Harrah's employees, resulting in severe, irreversible injuries, and he has brought a negligence action.

The lower court granted summary judgment to the employer, regarding "Mrs. Dugan's brain injury as an aggravation of a pre-existing physical condition, the damages from which are covered by worker's compensation." *Id.*, at 1326. The appellate court affirmed, holding:

> [T]he parties agree that Mrs. Dugan's heart event is non-compensable because there was no employment-related injury, stress or exertion which substantially contributed to this episode. Nonetheless, even under the plaintiffs' theory, Mrs. Dugan's brain injury was not an uninterrupted consequence of her heart event, [but] . . . caused in whole or in part by an intervening incident – the delay in emergency medical attention caused by [the employer's] action in blocking [911] access . . .
>
> [T]he delay in emergency medical attention caused by [the employer's] bar to [911] telephone access combined with Mrs. Dugan's non-compensable, pre-existing heart condition to cause, at least in part, her severe brain injury. This inability to reach emergency assistance through [911] constitutes an 'accident' for purposes of [Arizona's worker's compensation statute]." *Id.*, at 1328-29.

FISHER & PHILLIPS LLP
300 S. Fourth Street, Suite 1500
Las Vegas, Nevada 89101

Here, similarly, the parties agree that Baiguen's stroke itself is not covered by the NIIA. However, Baiguen's theory of the case is that the long-term effects of the stroke were exacerbated by a delay in receiving medical treatment (or at least the delay denied him the opportunity to receive t-PA, which might have allowed him to avoid or mitigate the long-term consequences of the stroke). Thus, as in *Dugan*, his claim is exclusively covered by worker's compensation because Baiguen's present condition (according to him) resulted from a combination of his non-compensable, pre-existing condition and the alleged negligent acts or omissions of Harrah's employees.

Harrah's extensively discussed *Dugan* in the lower court. In another instance of pretending that unfavorable case law does not exist, Baiguen does not even cite this salient case in his Opening Brief, let alone try to distinguish it.

The "Increased Risk" Test Does Not Apply In This Case, And Even If It Did, The Test's Application Supports The Affirmation Of Summary Judgment Because Baiguen Was Subjected To A Greater Risk Than Members Of The General Public

Baiguen claims the District Court committed reversible error by failing to consider and apply the "increased risk" test enunciated in

FISHER & PHILLIPS LLP
300 S. Fourth Street, Suite 1500
Las Vegas, Nevada 89101

Phillips. (See, e.g., Opening Brief, p. 18).[13] As demonstrated below, the increased risk test is inapplicable to this case, and even if it was, would not warrant the reversal of summary judgment.

Citing *Phillips*, Baiguen claims: "The determination of whether an injury 'arose out of employment' is made by the application of the 'increased risk test.'" (Opening Brief, p. 8). This is a misstatement of the law and *Phillips'* holding.

As stated above, "determining the type of risk faced by the employee is an important first step in analyzing whether the employee's injury arose out of her employment," with risks being categorized as "those that are solely employment related, those that are purely personal, and those that are neutral." *Phillips*, 126 Nev. 346 at 350-351, 240 P.3d at 5. In *Phillips*, this Court "adopt[ed] the increased-risk test to determine whether an injury resulting from a *neutral risk* is compensable." *Id.*, 126 Nev. 346 at 353, 240 P.2d at 6 (emphasis added). The increased risk test

[13] While the test is now an integral part of Baiguen's position on appeal, he did not mention the test or cite *Phillips* in his summary judgment opposition, raising the matter for the first time at oral argument. (App. Vol. 2 00212:20-23).

FISHER & PHILLIPS LLP
300 S. Fourth Street, Suite 1500
Las Vegas, Nevada 89101

does not apply in this case because, for the reasons set forth above, the risks faced by Baiguen were employment-related, not neutral.[14]

Even if, *hypothetically*, the risks involved in this case were neutral such that the increased risk test applied, under the test, worker's compensation applies if the employee "is subjected 'to a risk greater than that to which the general public [is] exposed.'" *Phillips*, 126 Nev. 346 at 353, 240 P.3d at 7 (citation omitted). The general public typically has no authorized access to the "back of the house" areas such as the employee parking garage and the Housekeeping Office (where Baiguen performed activities upon arrival at work). Baiguen was in these areas when he supposedly exhibited his stroke symptoms and purportedly needed medical assistance. To the extent there was a risk that his co-workers would not recognize the symptoms of a stroke and/or not know to promptly summon medical attention in response thereto, Baiguen faced a greater risk in these areas than members of the general public.

[14]As noted in the previous section, Baiguen repeatedly takes the position that his injuries did not arise out of his employment because the risks were "personal" in nature. While this is inaccurate for the reasons set forth above, if the risks were, in fact, "personal" – as opposed to "neutral" – then the increased risk test would not apply at all. *Phillips*, 126 Nev. 346 at 353, 240 P.3d at 6.

FISHER & PHILLIPS LLP
300 S. Fourth Street, Suite 1500
Las Vegas, Nevada 89101

Even If Baiguen's Claim Is Not Preempted By Worker's Compensation, Baiguen Cannot Establish That The Consequences Of His Stroke Were Exacerbated By the Alleged Negligence of Harrah's

Even if Baiguen's negligence claim is not preempted by worker's compensation (which it is), such a claim requires causation, which consists of both actual cause and proximate cause. *Dow Chemical Company v. Mahlum*, 114 Nev. 1468, 1481, 970 P.2d 98, 107 (1998), overruled in part on other grounds by 117 Nev. 265, 21 P.3d 11. Actual causation requires Baiguen to "show that but for [Harrah's] negligence, his . . . injuries would not have occurred." *Sims v. General Telephone & Electronics*, 107 Nev. 516, 524, 815 P.2d 151, 156 (1991) (citation omitted), overruled on other grounds by 113 Nev. 1349, 951 P.2d 1027.

Baiguen claims his "stroke was proximately and/or legally caused by, or worsened by, or the chances of avoiding or mitigating or treating [the] same were significantly decreased by, the delay in diagnosis and treatment caused by Defendants." (See, App. Vol. 0003 ¶ VI). Dr. Shprecher testified 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. However, there was no guarantee that Baiguen's personal situation would have fallen into this 30%. In fact, there was a

FISHER & PHILLIPS LLP
300 S. Fourth Street, Suite 1500
Las Vegas, Nevada 89101

possibility that the administration of t-PA could have resulted in Baiguen's death.

Moreover, a number of things had to happen for Baiguen to even have been administered t-PA, and whether these would have all occurred is a matter of speculation. First, with a diabetic patient like Baiguen, t-PA must be administered within three hours of the onset of stroke symptoms. While Baiguen would like everyone to believe the symptoms started one minute before Santaren saw him between the estimated time of 4:10 or 4:15 p.m., this is uncertain. It is possible the symptoms started before Baiguen left his apartment or while driving.[15] Even if the symptoms started only after Baiguen got to the parking garage, given that Bradley saw Baiguen get into his car about 3:30 p.m. and the drive between Baiguen's apartment and Harrah's is only 1.40 miles, Baiguen could have started experiencing the symptoms in the garage by 3:40 or 3:45 p.m. and remained in his vehicle for a period of time before going to the employee congregation area.

Once Baiguen got in the Housekeeping Department area and came in contact with supervisors close to 4:30 p.m., even if an almost immediate

[15] Dr, Shprecher testified that while uncommon, it is possible Baiguen could have driven to work while experiencing the initial symptoms of a stroke. (App. Vol. 1 00125:15-21; 00126:22-24).

FISHER & PHILLIPS LLP
300 S. Fourth Street, Suite 1500
Las Vegas, Nevada 89101

decision was made to call 911, it would have taken emergency providers time to arrive at the hotel, assess the situation and, if appropriate, take Baiguen to an emergency room. Once at the emergency room, on average, only about 50% of patients are administered t-PA within the first hour of arrival, and under no scenario is it likely that t-PA would have been administered within 40 minutes of arrival. t-PA would likely not have been administered if there was a lack of certainty as to the onset time of the stroke symptoms, which would have required contact with Bradley, the last known person to see him when he appeared to be "normal." It is unknown if hospital employees would have been able to elicit that Bradley was the appropriate person to call, had her contact information and been able to reach her on the first attempt.

Again, it is speculative whether everything would have aligned such that Baiguen would have been a candidate to receive t-PA, which might or might not have made a difference, if it did not make the situation worse, up to and including killing Baiguen. It cannot be established that but for Harrah's failure to call 911 or otherwise get Baiguen to the hospital, Baiguen would have been given t-PA and returned to, or close to, his pre-

FISHER & PHILLIPS LLP
300 S. Fourth Street, Suite 1500
Las Vegas, Nevada 89101

stroke condition, and summary judgment could have been granted for this additional reason.[16]

[16] Baiguen claims he is entitled to the benefit of the "loss of chance" doctrine. (Opening Brief, pp. 6; 9). This doctrine provides that the "injury to be redressed by the law . . . [is] the decreased chance of survival [or avoiding a debilitating injury or illness] *caused by the medical malpractice*." *Perez v. Las Vegas Medical Center*, 107 Nev. 1, 6, 805 P.2d 589, 592 (1991) (citation omitted) (emphasis added). The purpose of the doctrine is to avoid barring recovery, "no matter how blatant the *health care provider's* negligence" in situations where the person at issue may have died or suffered serious injury or illness notwithstanding the negligence. *Id.*, 107 Nev. at 5, 805 P.2d at 591 (emphasis added).

Since the loss of chance doctrine was adopted by *Perez* in 1991, it appears there have only been a limited number of Nevada Supreme Court cases which have subsequently cited it in relation to the doctrine, all of these involving medical malpractice. There is no indication the doctrine would be applied to the alleged negligence of an employer.

Moreover, even if the doctrine were deemed applicable, "in order to create a question of fact regarding causation . . ., the plaintiff must present evidence tending to show, to a reasonable medical probability, that some negligent act or omission . . . reduced a substantial chance of survival given appropriate medical care." *Perez,* 107 Nev. at 6, 805 P.2d at 592. In *Perez*, summary judgment was avoided because a doctor testified the decedent "had a reasonable chance of survival given proper medical attention." *Id.*, 107 Nev. at 7, 805 P.2d at 592. Dr. Shprecher did not report or testify that Baiguen would have definitely or even likely benefitted from being given t-PA. He did not even testify that Baiguen personally would have had a 30% chance of recovery to his pre-stroke state if he had been administered t-PA. As stated above, Dr. Shprecher's report merely talks in terms of statistics without taking into consideration the circumstances applicable to Baiguen.

FISHER & PHILLIPS LLP
300 S. Fourth Street, Suite 1500
Las Vegas, Nevada 89101

CONCLUSION

For the reasons set forth herein, the order of the District Court granting summary judgment should be affirmed.

Respectfully submitted,

FISHER & PHILLIPS LLP

SCOTT M. MAHONEY, ESQ.
Bar No. 1099
300 S. Fourth Street
Suite 1500
Las Vegas, Nevada 89101
(702) 252-3131
Attorneys for Respondents

FISHER & PHILLIPS LLP
300 S. Fourth Street, Suite 1500
Las Vegas, Nevada 89101

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 2013 in 14-point Times New Roman font.

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 30 pages.

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

///

///

///

FISHER & PHILLIPS LLP
300 S. Fourth Street, Suite 1500
Las Vegas, Nevada 89101

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

Dated this 12th day of October 2016.

FISHER & PHILLIPS LLP

By: _____

Scott M. Mahoney, Esq.
Nevada Bar No. 1099
300 South Fourth Street
Suite 1500
Las Vegas, NV 89101
Attorneys for Respondents

FISHER & PHILLIPS LLP
300 S. Fourth Street, Suite 1500
Las Vegas, Nevada 89101

CERTIFICATE OF SERVICE

I hereby certify service of the foregoing Respondent's Answering Brief was made this date by electronic filing and/or service with the Supreme Court of the State of Nevada and by mailing a true and correct copy, addressed as follows:

Jeff Galliher, Esq.
Law Offices of Steven M. Burris
2810 W. Charleston Blvd., Suite F-58
Las Vegas, NV 89102

Dated: October 12, 2016

By: /s/ Lorraine James-Newman
An employee of Fisher & Phillips LLP

FISHER & PHILLIPS LLP
300 S. Fourth Street, Suite 1500
Las Vegas, Nevada 89101